COURT OF APPEALS
DECISION
DATED AND FILED

July 22, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2064 **Cir. Ct. No. 2013CV1**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

SALEM EVANGELICAL LUTHERAN CHURCH, LOREN JOHNSON AND LORI JOHNSON,

PLAINTIFFS-RESPONDENTS,

V.

JULIETTE KANGAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Iron County: PATRICK J. MADDEN, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. This appeal involves a dispute over the distribution of funds in an investment account following the death of Jean Orsoni. Juliette Kangas asserts the investment account was a joint account that she and Orsoni

co-owned. As a result, she argues she became sole owner of the account at Orsoni's death. Salem Evangelical Lutheran Church, Loren Johnson, and Lori Johnson (collectively, the Plaintiffs) argue Orsoni did not intend to create a joint account and did not intend to gift the investment account to Kangas. The Plaintiffs argue the funds in the account should have passed into a revocable trust Orsoni created, of which the Plaintiffs are beneficiaries.

¶2 The circuit court found that Orsoni did not intend to create a joint account or gift the investment account to Kangas. The court imposed a constructive trust over the account on the grounds that Kangas breached her confidential relationship with Orsoni and her fiduciary duties as trustee of the revocable trust by failing to follow Orsoni's wishes in distributing the account's proceeds. Kangas appeals.

¶3 We conclude the circuit court's findings that Orsoni did not intend to create a joint account and did not intend to gift the investment account to Kangas are not clearly erroneous. We also conclude it was appropriate for the circuit court to impose a constructive trust because the investment account was transferred to Kangas by mistake. Finally, we reject Kangas's argument that three provisions in Orsoni's estate planning documents preclude the Plaintiffs' claims. We therefore affirm the circuit court's judgment, albeit on somewhat different grounds.

BACKGROUND

¶4 The Plaintiffs filed this lawsuit against Kangas in January 2013. They alleged Kangas breached a confidential relationship with Orsoni and breached her fiduciary duties as trustee of a revocable trust Orsoni created by failing to distribute funds in an Edward Jones investment account pursuant to the trust's terms. The Plaintiffs asked the court to impose a constructive trust over the

account and to order Kangas to distribute the funds as required by the revocable trust. In her answer to the complaint, Kangas asserted as an affirmative defense that the Plaintiffs had no right to the funds because Orsoni did not transfer the Edward Jones account to the revocable trust, but instead gifted it to Kangas individually. The case was tried to the circuit court on May 30, 2013. The following facts are taken from the trial testimony and exhibits.

¶5 Orsoni and her husband, Andrew Orsoni (Andrew), did not have any children. Kangas is the daughter of Andrew's sister, and was therefore Orsoni's niece by marriage. On December 15, 1994, Andrew signed a general durable power of attorney naming Kangas as his agent. Several days later, Orsoni signed a general durable power of attorney appointing Kangas as her agent.

¶6 As of December 1994, Orsoni and Andrew were co-owners of the Edward Jones account. The account contained their life savings and the proceeds from the sale of their tavern business. On January 5, 1995, shortly before Andrew's death, Orsoni signed a form transferring the Edward Jones account into Kangas's name. Kangas signed the transfer form on Andrew's behalf as his agent under the power of attorney. Although the account was transferred into Kangas's name, Orsoni continued to receive the account statements and meet with the investment advisor. Kangas did not play any role in managing the account. Kangas testified the account was transferred into her name in 1995 "[t]o protect the assets in case something happened to [Orsoni] … where [Orsoni and Andrew] would both be disabled." Kangas testified she did not believe the 1995 retitling was a gift to her, and she did not consider herself the sole owner of the account at the time. Instead, she believed she was a "caretaker" of the account on the Orsonis' behalf.

¶7 Sometime in 1995, Orsoni's estate planning attorney, Paul Sturgul, learned the Edward Jones account had been transferred into Kangas's name. Sturgul's assistant, Brian Tarro, testified he took Orsoni to Edward Jones on March 21, 1995, to have the account retitled in Orsoni's name. Tarro testified "papers were prepared" to accomplish the retitling, and Edward Jones was supposed to send them to Kangas. Tarro assumed Edward Jones mailed the papers to Kangas, but he did not know for certain. For reasons not explained in the record, the account was not retitled in Orsoni's name.

¶8 Orsoni subsequently signed the Jean B. Orsoni Revocable Living Trust (the revocable trust) on September 30, 1996. Along with grants to other beneficiaries, the revocable trust provided that, upon Orsoni's death, one percent of the trust estate would be distributed to Salem Evangelical Lutheran Church, and fifteen percent would be distributed to Loren and Lori Johnson, who were Orsoni's nephew and niece. The revocable trust also provided Kangas and her husband would receive Orsoni's home and motor vehicle, along with the residue of the trust estate. Orsoni was to act as trustee during her life, and Kangas was named successor trustee. The revocable trust further stated Orsoni had "transferred certain property to the Trustee or caused such trust to be designated beneficiary of certain property." However, the revocable trust did not specifically mention any property other than Orsoni's home and motor vehicle.

¶9 In addition to the revocable trust, Orsoni executed three other documents on September 30, 1996. First, she signed a pour-over will leaving her entire estate to the revocable trust. Second, she signed a document transferring her

"tangible personal property" to the revocable trust.[1] Third, she signed a quit claim deed transferring her home to the revocable trust. None of the documents Orsoni signed on September 30, 1996, specifically mentioned the Edward Jones account.

¶10 The Edward Jones account remained in Kangas's sole name until 2005. Kangas testified that, sometime in 2005, she was at Orsoni's home and saw something indicating the Edward Jones account was in Kangas's name. Kangas did not think the account should be in her name because it was "degrading" to Orsoni. Consequently, on June 30 and July 17, 2005, respectively, Orsoni and Kangas signed an "Account Authorization and Acknowledgement Form[.]" The form was admitted into evidence at trial as Exhibit 16. The upper right-hand corner of the form states, "Account Class Code: 02 - JOINT[.]" Orsoni's investment advisor at Edward Jones, David Riegler, testified that account code indicates the account was a joint account. Riegler further testified he understood the account to be a joint tenancy with right of survivorship.

¶11 Kangas testified it was her understanding that the 2005 retitling created a joint tenancy. She testified she believed the 2005 retitling was a gift to her by Orsoni because if Orsoni died first, Kangas would own the account outright. Kangas conceded Edward Jones continued sending the account statements to Orsoni until approximately 2007, when Orsoni could no longer handle her own affairs.

¶12 On December 16, 2006, Orsoni signed an amendment to the revocable trust, which changed how the trust estate would be distributed following

[1] It is undisputed that the Edward Jones account does not constitute "tangible personal property."

her death. As relevant here, the amendment increased the percentage of the trust estate that would be distributed to Salem Evangelical Lutheran Church from one percent to ten percent. The amendment also provided that Kangas and her husband would receive fifteen percent of the trust estate, rather than the residue. The amendment did not specifically refer to the Edward Jones account.

¶13 Orsoni signed several other estate planning documents on December 16, 2006, including: a "Certification of Trust[;]" a new pour-over will leaving her entire estate to the revocable trust; and a new general durable power of attorney naming Kangas as her agent and Kangas's husband as her alternate agent. In addition, as trustee of the revocable trust, Orsoni signed a trustee's deed conveying her home back to herself, individually. Orsoni then signed a quit claim deed conveying the home to Kangas, but reserving a life estate.

¶14 Orsoni died on April 4, 2010. The April 2010 statement for the Edward Jones account indicated an account value of $906,175.90 as of April 30. The statement listed both Orsoni and Kangas as account holders and described them as "joint tenants with right of survivorship." Although the April 2010 statement was not issued until after Orsoni's death, Riegler testified Orsoni would have received similar statements while she was alive. Riegler also testified he met with Orsoni regularly to review the status of the account. However, Riegler did not testify whether he ever told Orsoni the account was a joint account or a joint tenancy with right of survivorship or explained what those terms meant.

¶15 After Orsoni's death, Edward Jones transferred sole ownership of the account to Kangas. Beginning in June 2010, Kangas distributed $612,100

from the account to various parties, out of a total balance of $816,821.64 available for distribution.[2] In distributing the money, Kangas followed the revocable trust's terms to some extent but made certain changes she felt were appropriate. In particular, she testified she did not agree with the terms of the revocable trust providing that Loren and Lori Johnson should receive fifteen percent of the trust estate and Salem Evangelical Lutheran Church should receive ten percent. Therefore, she distributed $8,800 to Salem Evangelical Lutheran Church, which would have been entitled to $81,682.16 under the revocable trust, and $43,286.69 to Loren and Lori Johnson, who would have been entitled to $122,523.24. Kangas testified these distributions were "gifts" she made "out of respect for [Orsoni]." She testified it was her choice to make these gifts, she was not obligated to do so, and it was "up to [her]" to decide "who got what." After Kangas made these distributions from the Edward Jones account, it appears she retained the remaining $210,705.42. Under the terms of the revocable trust, Kangas would have been entitled to only fifteen percent of the Edward Jones account, or $122,523.24.

¶16 Kangas testified at trial that Orsoni was a sophisticated investor with a business school education and experience working for a savings and loan company. She described Orsoni as strong-willed and self-confident. Sturgul similarly testified Orsoni "had her own mind." It is undisputed that Orsoni was competent to execute the revocable trust, the amendment to the revocable trust, and the other documents relevant to this case. Further, the Plaintiffs do not allege Kangas exercised undue influence over Orsoni.

[2] Although the Edward Jones account contained $906,175.90 as of April 30, 2010, the amount available for distribution was only $816,821.64. This is partly because the account contained an annuity worth about $57,000, of which Kangas was the named beneficiary.

¶17 Kangas also testified at trial regarding her relationship with Orsoni. She stated that, at the time of Orsoni's death, they had known each other for over sixty years, and they saw each other on a daily basis. Orsoni's only living relatives were her cousins, nieces, and nephews, and aside from Kangas and Kangas's husband and son, Orsoni did not see these relatives on a regular basis. Kangas testified she acted as a caregiver for Orsoni in the years before her death, and she attended meetings with Sturgul regarding Orsoni's estate plan. She conceded she and Orsoni had a confidential relationship.

¶18 Following trial, the circuit court issued a decision in favor of the Plaintiffs. The court found that: (1) Kangas was in a confidential relationship with Orsoni; (2) there was "no corroboration of [Kangas's] claim that the Edward Jones account was just given to her[;]" and (3) there was no support for Kangas's claim that Exhibit 16, the "Account Authorization and Acknowledgement Form" executed in 2005, "by itself show[ed] that [Orsoni] clearly intended to create a joint account."

¶19 Based on these findings, the court concluded Kangas "erred in comingling her interest with [Orsoni's] by participating in the [2005] joint retitling and putting herself in a position where she could frustrate [Orsoni's] estate planning." The court further concluded Kangas had a "duty of loyalty" as trustee of the revocable trust, which required her to respect Orsoni's wishes "even where she disagreed with them." The court held Kangas breached that duty by failing to distribute the proceeds of the Edward Jones account according to the revocable trust's terms. The court therefore imposed a constructive trust and ordered Kangas to "make distributions pursuant to [the revocable] trust." The court subsequently entered a final judgment awarding $72,882.16 to Salem Evangelical Lutheran Church and $79,236.55 to Loren and Lori Johnson. Kangas now appeals.

DISCUSSION

¶20 "A constructive trust is an equitable remedy imposed to prevent unjust enrichment." ***Pluemer v. Pluemer***, 2009 WI App 170, ¶9, 322 Wis. 2d 138, 776 N.W.2d 261. Whether to impose a constructive trust is committed to the circuit court's discretion. ***Id.*** We will affirm the court's discretionary decision if it "examined the relevant facts, applied the proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Id.*** When reviewing a discretionary decision, we will not set aside the circuit court's factual findings unless they are clearly erroneous. ***Monicken v. Monicken***, 226 Wis. 2d 119, 125, 593 N.W.2d 509 (Ct. App. 1999). However, we independently review any questions of law. ***Id.***

¶21 Kangas challenges the circuit court's factual findings that the 2005 retitling of the Edward Jones account was not intended to create a joint account and was not a gift to Kangas. Kangas then argues the court erred by imposing a constructive trust because it wrongly concluded Kangas breached her confidential relationship with Orsoni and her fiduciary duties as trustee of the revocable trust. Finally, Kangas argues three provisions in Orsoni's estate planning

documents preclude the Plaintiffs' claim. We address Kangas's arguments in turn.[3]

I. Factual finding that Orsoni did not intend to create a joint account

¶22 Kangas argues the circuit court's factual finding that Orsoni did not intend to create a joint account is clearly erroneous.[4] Specifically, she argues the 2005 retitling created a joint account under WIS. STAT. ch. 705.[5] Pursuant to WIS.

[3] Kangas also challenges the circuit court's factual finding that "Exhibit 18 is further evidence that Ms. Kangas regarded herself as a trustee with respect to the Edward Jones account and claimed a two percent trustee's fee." Kangas testified at trial that Exhibit 18 was an "accounting" she prepared before her deposition to show how she distributed the funds in the Edward Jones account. She testified she was told to include a two percent trustee's fee in that accounting. Kangas argues there is no support for the circuit court's finding that she actually claimed a two percent trustee's fee. The Plaintiffs do not respond to this argument, and we therefore deem it conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). However, even if the circuit court's finding regarding Exhibit 18 and the two percent trustee's fee is clearly erroneous, we nevertheless conclude the court properly imposed a constructive trust, for the reasons discussed in Part III of this opinion.

[4] Kangas also argues the circuit court made an error of law when it found that Exhibit 16, "by itself," did not show Orsoni intended to create a joint account. Kangas argues the correct inquiry was whether "all of the facts and circumstances" showed Orsoni intended to create a joint account. However, when the circuit court's decision is read in its entirety, it is clear the court considered the totality of the circumstances and did not rely on Exhibit 16 alone. Accordingly, we do not address this argument further.

[5] We requested supplemental briefing from the parties on the issue of whether WIS. STAT. ch. 705 applied to the Edward Jones account. Specifically, we questioned whether the Edward Jones account could be considered an "account," as that term is defined in WIS. STAT. § 705.01(1). Under § 705.01(1), an account is: (1) a contract of deposit of funds; (2) between a depositor and a financial institution. A "financial institution" is defined as "any organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, banks and trust companies, savings banks, building and loan associations, savings and loan associations and credit unions." WIS. STAT. § 705.01(3).

After reviewing the parties' supplemental briefs, we agree with both parties that Edward Jones is a "financial institution" and the Edward Jones account is an "account" for purposes of WIS. STAT. ch. 705, pursuant to ***Reichel v. Jung***, 2000 WI App 151, 237 Wis. 2d 853, 616 N.W.2d 118.

(continued)

STAT. § 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." Kangas argues there was no clear and convincing evidence presented at trial that Orsoni did not intend the funds in the Edward Jones account to pass to Kangas on Orsoni's death.

¶23 We conclude the circuit court's finding that Orsoni did not intend to create a joint account is not clearly erroneous. WISCONSIN STAT. § 705.02(1) provides:

> Provisions in substantially the following form contained in a signature card, passbook, contract or instrument evidencing an account shall be effective to create the multiple-party accounts described in this subchapter when conspicuously printed or typewritten immediately above or adjacent to the place for the signatures of the parties to the account:
>
> (a) Joint account: "THIS ACCOUNT/CERTIFICATE OF DEPOSIT IS JOINTLY OWNED BY THE PARTIES NAMED HEREON. UPON THE DEATH OF ANY OF THEM, OWNERSHIP PASSES TO THE SURVIVOR(S)."

On Exhibit 16, the phrase "Account Class Code: 02 - JOINT" is not "conspicuously printed or typewritten immediately above or adjacent to" the signature line. *See* ***id.*** In addition, Exhibit 16 does not advise that when one account owner dies, ownership passes to the survivor(s). Consequently, Exhibit 16 was insufficient to create a joint account under § 705.02(1).

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶24 Kangas argues Exhibit 16 was nevertheless sufficient to create a joint account under WIS. STAT. § 705.02(3), which provides in relevant part:

> Any deposit made to an account created on or after July 1, 1975, and within the scope of this subchapter, which account is not evidenced by an agreement containing language in substantial conformity with this section, signed by the depositor in accordance with s. 705.01(1), shall nonetheless be deemed to create either a single-party relationship, with agency, or a joint or P.O.D. relationship, with or without the designation of one or more agents … *in accordance with whatever competent evidence is available concerning the depositor's intent at the time the account was created*.

(Emphasis added.) Kangas argues competent evidence in the record shows Orsoni intended to create a joint account when the Edward Jones account was retitled in 2005.

¶25 We disagree. Although titled "Account Authorization and Acknowledgement Form," Exhibit 16 has no language by which Kangas or Orsoni asked or directed Edward Jones to open an account or change the ownership of an existing account. The first section of the form, entitled "W9 Certification," merely required Orsoni to certify that certain tax information provided to Edward Jones was correct. The second section, entitled "Account Authorization," contains three paragraphs. The first paragraph states that the signatories—Kangas and Orsoni—agree to the terms and conditions of a separate "Account Agreement and Disclosure Statement," including a binding arbitration provision. There is no such "Account Agreement and Disclosure Statement" in the record. In the second paragraph, the signatories agree to the possibility of a margin account being opened for them as necessary and agree to accept the consequences. The third paragraph informs the signatories that "federal law requires Edward Jones to verify my identity when I open an account" and requires them to agree "to provide

the required information and documents to Edward Jones and agree to the verification of such information." None of these provisions actually direct Edward Jones to open a new account or change the ownership of an existing account. We therefore reject Kangas's argument that Exhibit 16 is competent evidence of Orsoni's intent to create a joint account.

¶26 Moreover, we agree with the Plaintiffs that other evidence introduced at trial supports the circuit court's finding that Orsoni did not intend to create a joint account. At trial, Kangas clearly testified she did not become the owner of the Edward Jones account when it was initially retitled in her name in 1995. She instead testified the purpose of the transfer was to "protect the assets" in the event Orsoni and her husband both became disabled. Kangas believed she was merely a "caretaker" of the account. Even though the account was transferred into Kangas's name, Orsoni continued to receive the account statements and manage the account without Kangas's input. These facts strongly support a conclusion that the 1995 retitling was for convenience only and was not intended to transfer actual ownership of the account to Kangas.

¶27 Kangas further testified the only reason the account was retitled in 2005 was that Kangas saw something at Orsoni's home indicating Kangas was the sole owner of the account, which Kangas felt was "degrading" to Orsoni. Orsoni did not prompt the retitling. After the 2005 retitling, Orsoni continued to receive account statements and manage the account until 2007, when she could no longer handle her own affairs. This evidence suggests the presence of Kangas's name on the account after the 2005 retitling continued to be a matter of convenience. On the whole, the evidence is more consistent with an intent to create a single-party relationship with agency than an intent to create a joint account. *See* WIS. STAT. § 705.05(1) ("A party to an account … may appoint one or more agents for

purposes of making withdrawals from the account."); *see also* WIS. STAT. § 705.02(3) (competent evidence of depositor's intent may suffice to create single-party relationship with agency). Although Kangas testified the 2005 retitling was a gift to her and was intended to create a joint tenancy with right of survivorship, the circuit court was free to reject that testimony as self-serving. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345 (circuit court, acting as factfinder, is ultimate arbiter of witness credibility).

¶28 In support of her argument that competent evidence shows Orsoni intended to create a joint account, Kangas relies heavily on Riegler's testimony that he understood the account was a joint tenancy with right of survivorship. However, what an Edward Jones employee understood is not dispositive of what Orsoni knew or intended when she signed Exhibit 16. Kangas similarly notes that Sturgul acknowledged at trial that the Edward Jones account was a joint tenancy. Again, Sturgul's opinion about the legal effect of Exhibit 16 is not evidence of Orsoni's intent.

¶29 Kangas also relies on the April 2010 account statement, which described Orsoni and Kangas as "joint tenants with right of survivorship." Riegler testified Orsoni would have received similar statements while she was alive.[6]

[6] Kangas asserts Riegler testified that all the statements Orsoni received "showed to Orsoni that the joint tenancy was with right of survivorship with [Kangas]." That assertion is misleading. At trial, Riegler was asked, "And to your recollection, all of the account statements that were sent to Jean Orsoni stated it was a joint account with right of survivorship, correct?" Riegler responded, "Yes, *as long as the statements were like [the April 2010 statement]*, yes." Riegler's affirmative response was contingent on the assumption that the other statements Orsoni received contained the same information as the April 2010 statement. Riegler did not testify that was actually the case.

Riegler also testified he met with Orsoni regularly to review the status of the account.[7] Kangas therefore argues Orsoni "presumably was informed … that the account was held jointly with [Kangas] with survivorship rights." That is one inference that could be drawn from the evidence. However, Riegler never testified he told Orsoni the account was a joint account or a joint tenancy with right of survivorship or explained what those terms meant. This, along with evidence suggesting Kangas's name was placed on the account for convenience only, supports a competing inference that Orsoni did not believe the account was a joint account. "Where competing inferences arise and the credible evidence will support or deny either inference, it is for the trier of fact to draw the proper inference[.]" ***Borneman v. Corwyn Transp., Ltd.***, 212 Wis. 2d 25, 32, 567 N.W.2d 887 (Ct. App. 1997).

¶30 Relying on ***Michaels v. Kruke***, 26 Wis. 2d 382, 132 N.W.2d 557 (1965), Kangas argues there was insufficient evidence to establish her name was placed on the Edward Jones account for convenience only. However, ***Michaels*** is distinguishable in two important ways. First, the passbook savings account at issue in ***Michaels*** was registered in the names of Helen Michaels or Harry Michaels, and immediately below those names were the words, "A joint and several account payable to either or the survivor." ***Id.*** at 386. In contrast, Exhibit 16 merely stated "Account Class Code: 02 - JOINT" in the upper right-hand corner. Second, the ***Michaels*** court found there was "no direct evidence" that Helen Michaels placed her son Harry's name on the account for convenience

[7] Kangas repeatedly states Riegler regularly reviewed the account statements with Orsoni. However, Riegler actually testified he and Orsoni regularly reviewed the "status" of the account. Riegler never specifically testified they reviewed the account statements.

only. ***Id.*** at 391. Here, Kangas testified without dispute that the Edward Jones account was transferred into her name in 1995 solely so that she could be a "caretaker" of the account in the event both Orsoni and her husband became disabled. Other evidence suggests Kangas continued to be a mere caretaker of the account after the 2005 retitling. The evidence that Kangas's name was added to the account for convenience only is stronger than the evidence was in ***Michaels***.

¶31 In summary, the "competent evidence" regarding Orsoni's intent does not indicate an intent to create a joint account, *see* WIS. STAT. § 705.02(3), and the circuit court's finding that Orsoni did not intend to create a joint account is not clearly erroneous. As a result, Exhibit 16 was insufficient to create a joint account under § 705.02(3). Accordingly, the presumption set forth in WIS. STAT. § 705.04(1) that funds in a joint account pass to the surviving owner on another owner's death does not apply because the Edward Jones account was not a joint account.

¶32 Alternatively, Kangas argues Exhibit 16 created a joint tenancy with right of survivorship, rather than a joint account. Specifically, Kangas argues the Edward Jones account satisfies the four requirements for a joint tenancy under the common law test. However, the common law test has been supplanted by WIS. STAT. § 700.19, which provides:

> The creation of a joint tenancy is determined by the intent expressed in the document of title, instrument of transfer or bill of sale. Any of the following constitute an expression of intent to create a joint tenancy: "as joint tenants", as joint owners", "jointly", "or the survivor", "with right of survivorship" or any similar phrase except a phrase similar to "survivorship marital property".

¶33 In her supplemental brief, Kangas argues the Edward Jones account qualifies as a joint tenancy under WIS. STAT. § 700.19 because Exhibit 16 includes

the phrase "Account Class Code: 02 - JOINT[.]" However, the Plaintiffs assert § 700.19 is inapplicable in this case due to WIS. STAT. § 700.22(1), which states:

> (a) In this subsection, "deposits" include checking accounts or instruments deposited into or drawn on checking accounts, savings accounts, certificates of deposit, investment shares or any other form of deposit.
>
> *(b) Nothing in ss. 700.17 to 700.21 governs the determination of rights to deposits in banks, building and loan associations, savings banks, savings and loan associations, credit unions or other financial institutions.*

(Emphasis added.) The parties agree that Edward Jones is a financial institution, and it is undisputed that Orsoni deposited funds into the Edward Jones account. Accordingly, we agree with the Plaintiffs that § 700.19 does not apply to the Edward Jones account.[8]

¶34 Finally, Kangas cites WIS. STAT. § 854.03(2)(a) for the proposition that the term "'co-owners with right of survivorship' includes joint tenants[.]" She therefore argues that, "by statutory definition, the Edward Jones joint account carried with it the survivorship feature." However, we have already concluded the

[8] Even if we applied the common law test, we would reject Kangas's argument that the Edward Jones account qualifies as a joint tenancy. At common law, four "unities" were necessary to create a joint tenancy: (1) time (the interest must be created at one and the same time); (2) title (the interest must be created in a single conveyance); (3) person (the interest must be created by one and the same person); and (4) possession (the possession by the joint tenants must be the same). ***Marchel v. Estate of Marchel***, 2013 WI App 100, ¶10, 349 Wis. 2d 707, 838 N.W.2d 97. Here, the evidence does not suggest Orsoni and Kangas exercised the same possession over the Edward Jones account. Orsoni alone managed the account and received the account statements until 2007, when she was no longer able to manage her own affairs. That Kangas only began receiving account statements after Orsoni became incapacitated supports a finding that Kangas's name was placed on the account for convenience only. In addition, while Kangas testified both she and Orsoni made withdrawals from the account after 2005, there is no evidence as to the purpose and frequency of these withdrawals. Kangas could have made the withdrawals on Orsoni's behalf and for her convenience. The mere fact that Kangas made withdrawals, without additional evidence, is not sufficient to show a unity of possession.

Edward Jones account was neither a joint account nor a joint tenancy. Moreover, § 854.03(2)(a) specifically states its definition of the term "co-owners with right of survivorship" applies "[i]n this subsection[.]" Kangas fails to explain why a definition that applies only in § 854.03(2), which deals with the 120-hour survivorship requirement, is applicable in this case.

II. Factual finding that Orsoni did not gift the Edward Jones account to Kangas

¶35 Kangas also challenges the circuit court's factual finding that Orsoni did not gift the Edward Jones account to her. In making this finding, the court implicitly concluded Orsoni did not intend the 2005 retitling to be a gift to Kangas. *See* ***Giese v. Reist***, 91 Wis. 2d 209, 218, 281 N.W.2d 86 (1979) (donative intent is one of four elements of a valid gift). The court's finding that Orsoni lacked donative intent is not clearly erroneous.

¶36 As evidence that Orsoni intended the 2005 retitling to be a gift, Kangas first cites the fact that, "in 1995, Orsoni voluntarily signed [a form] transferring the entire Edward Jones account to [Kangas]." However, Kangas herself testified the 1995 retitling was not a gift and did not make her the sole owner of the account. She instead described herself as a "caretaker" whose function was to "protect the assets" in the event both Orsoni and her husband were incapacitated. Based on Kangas's own testimony, we fail to see how the 1995 retitling shows Orsoni intended to gift the account to Kangas in 2005.

¶37 Kangas next notes that, "in 2005, Orsoni and [Kangas] voluntarily signed Exhibit 16 … transferring the entire Edward Jones account into a joint account between the two of them." This argument, however, improperly relies on the premise that Orsoni intended to create a joint account when she signed Exhibit

16. The circuit court made a finding to the contrary, and we have already concluded that finding is not clearly erroneous. *See supra*, Part I. Further, much of the same evidence supporting the circuit court's finding that Orsoni did not intend to create a joint account also supports its finding that Orsoni did not intend the 2005 retitling to be a gift. Specifically, the evidence strongly suggests the continued presence of Kangas's name on the account was for convenience only. *See supra*, ¶¶26-27.

¶38 Kangas next argues Orsoni must have intended the 2005 retitling to be a gift because Kangas was "Orsoni's niece-in-law, her closest relative, a very close friend, and the person who was always there to help [her]." Citing other gifts she and her family received from Orsoni, Kangas argues she was "clearly the object of [Orsoni's] financial bounty." We agree with the Plaintiffs that these facts do not show anything in particular about Orsoni's intent with respect to the Edward Jones account. They do not render the circuit court's finding that Orsoni lacked donative intent clearly erroneous.

¶39 Kangas further asserts the evidence shows Orsoni was mentally competent when the 2005 retitling occurred, Kangas did not exert undue influence over her, and there were no suspicious circumstances surrounding the transaction. Kangas does not, however, explain the relevance of these facts. That Orsoni knowingly and voluntarily signed Exhibit 16 does not establish she *intended* the 2005 retitling to be a gift to Kangas, particularly in light of other evidence supporting a contrary conclusion.

¶40 Kangas notes the Edward Jones account was "never titled to" the revocable trust. She also emphasizes that neither the original nor the amended version of the revocable trust specifically mentioned the account. She therefore

argues, "since the account was not governed by the [revocable trust], it had to be governed by the joint tenancy agreement, Exhibit 16, because there simply was no other document governing that account." This argument fails because it ignores Orsoni's pour-over will, which left her entire estate to the revocable trust. Because of the pour-over will, there was no need to title the account in the revocable trust's name or mention the account in the trust documents. Further, Sturgul testified it is very rare for a drafting attorney to specifically mention an asset in a trust document unless it is the subject of a specific bequest.

¶41 Kangas next argues Orsoni must have intended to gift the Edward Jones account to her because, in March 1995, Sturgul's assistant took Orsoni to Edward Jones for the purpose of retitling the account in Orsoni's name, but that retitling was never accomplished. We fail to see how this evidence shows Orsoni intended to gift the account to Kangas in 2005. From the evidence adduced at trial, it is reasonable to infer that Orsoni went to Edward Jones in March 1995 to have the account retitled, Edward Jones prepared the necessary paperwork and sent it to Kangas, but for whatever reason, Kangas did not complete the paperwork.[9] This hardly renders the court's finding that Orsoni did not intend to gift the account to Kangas clearly erroneous.

[9] Citing Riegler's testimony, Kangas asserts Edward Jones "never received any request to transfer the account back into Orsoni's name." Again, this assertion is misleading. Riegler actually testified that *he* never received a request to transfer the account *to the revocable trust*. He did not testify that Edward Jones never received a request to transfer the account, nor did he testify regarding any requests to transfer the account back to Orsoni. Further, Sturgul's assistant specifically testified he and Orsoni dealt with one of the secretaries in Riegler's office when requesting the transfer, rather than Riegler himself. This explains why Riegler may not have been aware of the request.

¶42 Next, Kangas asserts donative intent is "presumed" if an asset is owned as a joint tenancy with right of survivorship. She contends this presumption can be rebutted only by clear and satisfactory evidence to the contrary. Kangas also notes the length of time funds remain in a joint account is relevant to whether the presumption of donative intent has been rebutted. The problem with these arguments is that we have already concluded the 2005 retitling did not create a joint tenancy or a joint account under WIS. STAT. ch. 705. *See supra*, Part I. Consequently, the presumption of donative intent does not apply.

¶43 Finally, Kangas argues Orsoni must have intended the 2005 retitling to be a gift to Kangas because Kangas subsequently made withdrawals from the Edward Jones account and, beginning in 2007, the account statements were sent to Kangas. However, as we have already explained, Edward Jones began sending the account statements to Kangas only after Orsoni could no longer handle her own affairs. In addition, there is no evidence in the record regarding the purpose and frequency of any withdrawals Kangas made. The withdrawals could have been made on Orsoni's behalf and for her convenience. Kangas has not convinced us the circuit court's finding that Orsoni did not intend to gift the Edward Jones account to Kangas is clearly erroneous.

III. Decision to impose a constructive trust

¶44 Kangas next argues the circuit court erroneously concluded she breached her confidential relationship with Orsoni and her fiduciary duties as trustee of the revocable trust. Kangas therefore argues the court erred by imposing a constructive trust. We conclude the court properly imposed a constructive trust, albeit for a different reason. *See* ***State v. Earl***, 2009 WI App 99, ¶18 n.8, 320

Wis. 2d 639, 770 N.W.2d 755 (we may affirm on different grounds than those relied on by the circuit court).

¶45 A constructive trust is "an equitable device created by law to prevent unjust enrichment, which arises when one party receives a benefit, the retention of which is unjust to another." ***Wilharms v. Wilharms***, 93 Wis. 2d 671, 678, 287 N.W.2d 779 (1980). The remedy will be imposed

> only in limited circumstances. The legal title must be held by someone who in equity and good conscience should not be entitled to beneficial enjoyment. Title must also have been obtained by means of actual or constructive fraud, duress, abuse of a confidential relationship, mistake, commission of a wrong, or by any form of unconscionable conduct.

Id. at 678-79.

¶46 As explained above, the circuit court found that Orsoni did not intend to create a joint account or gift the Edward Jones account to Kangas. These findings, which are not clearly erroneous, support a conclusion that legal title to the account is "held by someone [Kangas] who in equity and good conscience should not be entitled to beneficial enjoyment." *See* ***id.*** at 679. In other words, the circuit court's findings show that Kangas was unjustly enriched by her receipt of the account.

¶47 Further, the circuit court's findings support a conclusion that Kangas obtained title to the account because of a mistake. "Mistake as a grounds for the imposition of a constructive trust applies where property is conveyed to someone who was not intended to receive the property by the donor[.]" ***Id.*** at 680 n.2. Here, Edward Jones conveyed the account to Kangas after Orsoni's death because it believed the account was a joint account or a joint tenancy with right of

survivorship. Given the circuit court's findings, that belief was incorrect. Edward Jones therefore conveyed the account "to someone [Kangas] who was not intended to receive the property by the donor [Orsoni]." *See* ***id.*** Accordingly, the circuit court properly exercised its discretion by imposing a constructive trust.

IV. Preclusion of the Plaintiffs' claim

¶48 Finally, Kangas argues three provisions in Orsoni's estate planning documents preclude the Plaintiffs' constructive trust claim. She first cites Paragraph F. from the revocable trust, which states:

> No one dealing with the Trustee need or shall be entitled to inquire concerning the validity of anything done or omitted to be done or purported to be done by such Trustee or to see to the application of any money paid or property transferred to or upon the order of such Trustee.

Kangas argues this language shows that Orsoni "did not want the Plaintiffs, or a court, to inquire into the validity of anything done or omitted to be done or purported to be done by … [Kangas]." However, Sturgul testified Paragraph F. did not mean "that no one in the future … would have any right to question the trustee … as far as what they transferred to the Trust or did not transfer to the Trust." Sturgul instead testified Paragraph F. was intended to "show the validity of a Trust …. [b]ecause we want the Trust to be honored by entities to whom it's presented." We agree with Sturgul's interpretation. Moreover, Kangas does not cite any authority for the proposition that language in a trust document can vitiate the trustee's fiduciary duty to follow the terms of the trust.

¶49 Kangas next argues the Plaintiffs' constructive trust claim is precluded by the following provision from Orsoni's 1994 power of attorney: "No agent named or substituted agent in this power shall incur any liability to me for

acting or refraining from acting under this power, except for such agent's own misconduct or negligence." Kangas also cites the following provision from Orsoni's 2006 power of attorney:

> I hereby ratify and approve any act of my Agent or successor Agent(s) acting under this Durable Power of Attorney and any such as done by my Agent or successor Agent(s) during such time … and I hereby declare that any act lawfully done hereunder by my Agent or successor Agent(s) shall be binding on myself and my heirs, personal representatives and my assigns, whether the same shall have been done before or after my death[.]

Both of these provisions refer to acts undertaken by Kangas in her capacity as Orsoni's agent. However, there is no evidence in the record that either the 1994 or 2006 power of attorney was ever activated. The Plaintiffs' constructive trust claim is not based on anything Kangas did or failed to do while acting as Orsoni's agent, and Kangas does not claim she was acting as Orsoni's agent under either power of attorney when she distributed the funds in the Edward Jones account. As a result, the provisions Kangas cites are inapplicable.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.