COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP712 **Cir. Ct. No. 2013CV129**

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

CARLY M. MCDONAH AND NELLIE MCDONAH,

PLAINTIFFS-APPELLANTS,

V.

CANDICE K. MCDONAH,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed*.

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

¶1 HOOVER, P.J. Carly McDonah and Nellie McDonah seek a constructive trust over life insurance proceeds disbursed upon their father's death to their stepmother, Candice McDonah. Carly and Nellie argue the circuit court misinterpreted a divorce order and settlement agreement, which they contend

required their father to maintain them as named life-insurance beneficiaries into perpetuity. We reject Carly's and Nellie's argument and affirm.

BACKGROUND

¶2 Carly's and Nellie's parents divorced in Florida in April 1999. At that time, Carly was age ten and Nellie was age seven. The divorce judgment ordered their father, Gerald McDonah, Jr., to pay child support until each child became self-supporting under any of several scenarios. It further required Gerald to pay temporary alimony for six years. Additionally, the judgment "approved and incorporated" the parties' "Shared Parental Responsibility, Support, Visitation and Property Settlement Agreement."

¶3 The basic terms of both the child support and alimony provisions of the divorce judgment were also set forth in the settlement agreement. Additionally, the settlement agreement provided that the parents would have "shared parental responsibility," but that the "primary residence of the minor children shall be with the Mother." The child support provision of the agreement stated, "Each parent has an equal responsibility to support the children …." The settlement agreement also provided that Gerald would continue to provide health insurance for the children until they "reach the age of eighteen … years, marry, become self-supporting or die." Further, the settlement agreement required the parties to split the costs of any child's uncovered medical, vision, or dental bills, again subject to the same termination provision.

¶4 Finally, in addition to dividing the parties' assets and liabilities, the settlement agreement provided the following, stand-alone clause: "Each party will

continue to carry life insurance in the minimum amount of $100,000 with the children named as the irrevocable beneficiaries thereof."[1]

¶5 The child support provisions of both the divorce judgment and the settlement agreement included similar language providing that if a child was still in high school on her eighteenth birthday, support would continue until either graduation or age nineteen, whichever occurred first. The younger daughter, Nellie, turned eighteen in October 2009 and graduated from high school in May 2010. Gerald maintained the requisite life insurance policy from the time of divorce until June 2010. At that time, he changed the beneficiary to his then-current wife, Candice.

¶6 Gerald died in October 2012 at age fifty-seven, and the life insurance proceeds were paid to Candice. Carly and Nellie were age twenty-four and twenty-one at the time of Gerald's death. They sued Candice for a constructive trust over the life insurance proceeds, asserting the divorce judgment required Gerald to maintain them as named beneficiaries into perpetuity. Both sides moved for summary judgment. The circuit court granted judgment in Candice's favor. Carly and Nellie appeal.

DISCUSSION

¶7 Carly and Nellie argue that under a correct interpretation of their parents' divorce judgment and settlement agreement, the circuit court should have

[1] The stand-alone life insurance provision was simply titled, "LIFE INSURANCE[.]" However, the settlement agreement also provides: "The parties agree that the underlined headings set forth in this Agreement are for the convenience of the parties only and shall not, in any way, affect the interpretation of this Agreement or of any terms and provisions contained herein."

granted summary judgment in their favor, awarding them a constructive trust over their father's life insurance proceeds. Summary judgment is appropriate where no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). The construction of a divorce judgment is a legal issue subject to a de novo standard of review. ***Waters v. Waters***, 2007 WI App 40, ¶6, 300 Wis. 2d 224, 730 N.W.2d 655. We apply the rules of contract construction to both divorce judgments and stipulations. ***Id.*** Judgments are construed at the time of their entry and in the same manner as other written instruments. ***Estate of Barnes v. Hall***, 170 Wis. 2d 1, 6, 486 N.W.2d 575 (Ct. App. 1992), *overruled in part by* ***Tensfeldt v. Haberman***, 2009 WI 77, ¶34, 319 Wis. 2d 329, 768 N.W. 2d 641.[2] Whether a judgment or contract is ambiguous is a question of law. ***Id.*** Words or phrases are ambiguous when they are reasonably or fairly susceptible of more than one construction. ***Id.***

¶8 The parties agree that the essential issue presented is whether the settlement agreement's life insurance provision was intended as child support or

[2] ***Estate of Barnes v. Hall***, 170 Wis. 2d 1, 13, 486 N.W.2d 575 (Ct. App. 1992), "h[e]ld that because the law does not allow estate planning in a divorce for purposes of creating a property benefit for adult children, the clause at issue, as a matter of law, must be treated as one relating to child support." However, ***Tensfeldt v. Haberman***, 2009 WI 77, ¶34, 319 Wis. 2d 329, 768 N.W. 2d 641, held,

> To the extent that ***Barnes*** can be read to imply that a property benefit for adult children cannot be incorporated into a court order, we reject the premise. It is not a complete statement of the law. The 1973-74 statutes explicitly provided for the parties to stipulate to a division of the estate, and for the court to accept the parties' stipulation and incorporate it into the divorce judgment[.]

We observe that Westlaw's online citation service classifies ***Estate of Barnes*** as merely being "distinguished by" ***Tensfeldt***. While it is accurate that ***Tensfeldt***, 319 Wis. 2d 329, ¶33, also distinguished the facts of that case from ***Estate of Barnes***, the above quotations demonstrate ***Tensfeldt*** expressly overruled ***Estate of Barnes*** in part.

property division. If the provision was intended as child support, the requirement terminated together with Gerald's other support requirements upon Nellie's graduation from high school. If, on the other hand, the provision was intended as property division, Gerald was required to indefinitely maintain the policy with his daughters as beneficiaries. If Gerald violated the life insurance provision, the proper remedy is a constructive trust over the insurance proceeds, even where the transferee, Candice, took no part in the misdeed. *See* ***Richards v. Richards***, 58 Wis. 2d 290, 292, 297-99, 206 N.W.2d 134 (1973).

¶9 "The constructive trust is an invention of equity by which liability is imposed to prevent unjust enrichment and unfairness." ***Id.*** at 296. A constructive trust "is created by law to equitably prevent unjust enrichment, which arises when one party receives a benefit, the retention of which would be unjust as against the other." ***Id.*** at 296-97.

> 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 [or she] ought not in equity and in good conscience beneficially enjoy.

Id. at 297 (parentheses and quoted source 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 (quoting 5 A. Scott, Laws of Trusts 3444 (3d ed. 1967)).

¶10 We first address Candice's argument that Carly and Nellie could not demonstrate unjust enrichment. The circuit court partly relied on this argument in

its decision, concluding the daughters could not prove the unjust enrichment element that they "conferred a benefit upon" Candice. Candice's argument in this respect should have been rejected.

¶11 Focusing on the above references to "unjust enrichment" in the case law, Candice relays the three commonly cited elements of a quasi contract cause of action for unjust enrichment.

> In Wisconsin, an action for unjust enrichment, or quasi contract, is based upon proof of three elements: (1) a benefit conferred on the defendant by the plaintiff, (2) appreciation or knowledge by the defendant of the benefit, and (3) acceptance or retention of the benefit by the defendant under circumstances making it inequitable for the defendant to retain the benefit.

Watts v. Watts, 137 Wis. 2d 506, 531, 405 N.W.2d 303 (citing ***Puttkammer v. Minth***, 83 Wis. 2d 686, 688-89, 266 N.W.2d 361 (1978)); *see also* ***Abbott v. Marker***, 2006 WI App 174, ¶20, 295 Wis. 2d 636, 722 N.W.2d 162, ("A plaintiff may recover through quasi-contract unjust enrichment when the plaintiff confers a benefit on the defendant, the defendant is aware of the benefit, and the retention of the benefit would be inequitable."). Candice asserts that because Carly and Nelly conferred no benefit upon her, they cannot prove unjust enrichment.[3] However, this is not a quasi contract case. The three elements cited above—although commonly referred to as the elements of unjust enrichment—are in fact the elements only of a quasi contract theory of unjust enrichment.

[3] Although first arguing that Carly and Nellie cannot demonstrate the "conferred benefit" element of unjust enrichment, Candice essentially concedes they could nonetheless demonstrate entitlement to a constructive trust. However, she then ignores the applicable case law and argues a constructive trust would be inappropriate because, inter alia, she committed no wrong.

¶12 Numerous prior cases have approved of a constructive trust, even in circumstances similar to those here, where children or an ex-spouse would be unable to show a benefit conferred upon a parent's or ex-spouse's third-party, subsequent spouse. None of the third-party constructive trust cases set forth the three quasi contract unjust enrichment elements, much less consider whether they are satisfied. *See, e.g.*, ***Richards***, 58 Wis. 2d 290; ***Wilharms v. Wilharms***, 93 Wis. 2d 671, 678-81, 287 N.W.2d 779 (1980); ***Singer v. Jones***, 173 Wis. 2d 191, 496 N.W.2d 156 (Ct. App. 1992); ***Connecticut Gen. Life Ins. Co. v. Merkel***, 90 Wis. 2d 126, 279 N.W.2d 715 (Ct. App. 1979) (collecting cases). Indeed, in ***Sulzer v. Diedrich***, 2003 WI 90, ¶¶18-19, 263 Wis. 2d 496, 664 N.W.2d 641, our supreme court affirmed the court of appeals' imposition of a constructive trust over the proceeds of an ex-spouse's retirement account, despite the court of appeals' determination that there was a failure to satisfy the unjust enrichment "requirement that a benefit be conferred upon the defendant by the plaintiff."

¶13 Having concluded Carly and Nellie could appropriately obtain a constructive trust over Gerald's life insurance proceeds without demonstrating the elements of quasi contract unjust enrichment, we next interpret the divorce settlement agreement to determine whether Gerald improperly changed the insurance beneficiary. The facts here are remarkably similar to those in ***Estate of Barnes***, where the court observed, "This case concerns the interpretation of a clause commonly found in divorce judgments whereby one party to a divorce is ordered to keep in force a life insurance policy with the children as beneficiaries." ***Estate of Barnes***, 170 Wis. 2d at 5. There, the clause stated, "[T]he plaintiff shall not change the beneficiary or beneficiaries of said policy." ***Id.*** Just as here, the question was whether the clause "survive[d] the termination of the support obligation." ***Id.*** Also like here, the clause was separate from others addressing

property division, maintenance, and child support; and some other provisions had express "termination language" stating that a given duty would expire when the children reached age eighteen. ***Id.*** at 7-8.

¶14 After considering essentially the same arguments presented here, the court ultimately determined the life insurance clause in that case was ambiguous, stating both sides presented reasonable interpretations and the court was unable to "resolve the ambiguity from reading the judgment as a whole." ***Id.*** at 8.

¶15 Nonetheless, in the absence of clarifying language, we believe it is objectively more reasonable to interpret a life-insurance-for-the-children clause in a divorce judgment as applying only while the children are still minors. As Candice argues, it makes little sense for parents to maintain a life insurance policy in favor of their children into perpetuity. As a parent becomes elderly, life insurance generally becomes extremely expensive, if available at all. At the same time, the adult children's dependence on such a parent generally diminishes as the children age, particularly as they transition to retirement themselves. Thus, while divorcing parties are legally permitted to divide their estates in favor of children in a divorce judgment, *see* ***Tensfeldt***, 319 Wis. 2d 329, ¶¶34-35,[4] it seems highly implausible from a practical standpoint that parents would elect to do so by creating an interminable life insurance policy requirement.

¶16 In any event, there is one substantial difference between the provision here and the one interpreted in ***Estate of Barnes***. In the present case, the

[4] In ***Tensfeldt***, the divorce judgment did not involve a life insurance provision. Rather, the parties stipulated that the father would maintain a will leaving two-thirds of his net estate to his children. ***Tensfeldt***, 319 Wis. 2d 329, ¶8.

life insurance clause was made jointly applicable to both parents, rather than just one. When considered in light of the impracticality of an interminable life-insurance requirement, this fact, together with the settlement agreement's express recognition that both parents bore a responsibility to support the children, leads us to conclude that the parents intended the bilateral life insurance provision to be a component of child support. The provision effectively created a safety net for the minor children's care in the event either parent died and was unable to contribute to their rearing. As the circuit court reasoned,

> Actually, the parent with primary placement also has a duty of supporting a child. Even though there might not be a support order, it's assumed that the child support of the noncustodial parent cannot cover all the expenses of the children. So if mom had died, I think having the minor children as beneficiary was another way to support them.

¶17 Because the life insurance provision terminated together with other child support obligations after Nellie's graduation from high school, Gerald committed no wrong when he subsequently changed the beneficiaries of his policy. Accordingly, it would be inappropriate to recognize a constructive trust over the insurance proceeds. *See* ***Richards***, 58 Wis. 2d at 297.

¶18 We further observe that the only evidence of intent in the record confirms our analysis. "If there is ambiguity and intent is at issue, the intent of the parties is a question of fact." ***Estate of Barnes***, 170 Wis. 2d at 8. Both parties here moved for summary judgment, thus effectively conceding there were no disputed issues of material fact. *See* ***Silverton Enters., Inc. v. General Cas. Co. of Wis.***, 143 Wis. 2d 661, 669, 422 N.W.2d 154 (Ct. App. 1988). There was no affidavit or other evidence presented regarding Carly's and Nellie's mother's understanding of the life insurance provision or whether she continued to maintain a policy in favor of her daughters. On the other hand, Gerald dutifully maintained

the life insurance as required until after the youngest daughter graduated from high school. This conduct evinces Gerald's understanding that the obligation would expire together with his other child support obligations. The only reasonable inference from the evidence presented below is that the provision was intended to be a component of child support.

By the Court.—Order affirmed.

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