

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 3, 2015

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2014AP2878

Cir. Ct. No. 2013CV3602

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE MATTER OF KARI FOSEID'S POWER OF
ATTORNEY FOR FINANCES AND PROPERTY:**

KRISTIN ROBBINS, DDS,

PETITIONER-APPELLANT,

v.

THOMAS FOSEID AND KATHRYN WALTERS,

INTERESTED PARTIES-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
FRANK D. REMINGTON, Judge. *Affirmed.*

Before Kloppenburg, P.J., Higginbotham, and Blanchard, JJ.

¶1 PER CURIAM. This case involves unequal transfers of money by the late Mary Jane Foseid to her children, focusing on the fact that Mary Jane

transferred what could be considered a double share of settlement money that Mary Jane had received to one of her children, Kathryn Walters, but transferred only a nominal share of the settlement money to another of her children, Kari Foseid, who is disabled.¹ In this action, yet another of Mary Jane's children, Kristin Robbins, filed a petition requesting the circuit court to (1) impose a constructive trust on the transferred money that Robbins claims that Walters holds for Kari's benefit, or (2) order Robbins' brother Thomas Foseid, as power of attorney for Kari, to demand an accounting from Walters of this money and to direct that the transferred money be placed in trust for Kari.

¶2 The circuit court denied Robbins' motion for summary judgment, granted summary judgment in favor of Thomas and Walters, and dismissed Robbins' petition. Robbins appeals. For the following reasons, we affirm each decision.

BACKGROUND

¶3 After one of her sons died in an accident in 1995, Mary Jane received proceeds from a settlement agreement. Mary Jane transferred to her children some of the proceeds in shares of approximately \$51,000. All but two of the children received an equal share. As to the two, Mary Jane's youngest daughter, Walters, received a "double share" (approximately \$102,000) and daughter Kari received a mere nominal share equivalent to 73 cents. Kari was born with profound disabilities and has long received public assistance and lived in an assisted living facility. Mary Jane's attorney distributed the settlement

¹ For the sake of simplicity, we generally use only the first names of the multiple people in this case who share the surname Foseid.

money to the children without expressing to them any restriction on how they could use their allotted shares.

¶4 One year after Mary Jane had the attorney distribute the settlement money, Mary Jane developed an estate plan with the assistance of the same attorney. This estate plan included a special needs trust for Kari to be established upon Mary Jane's death. Mary Jane died in 2003. Pursuant to Mary Jane's estate plan, Kari's special needs trust was funded by Mary Jane's estate. Kari's brother, Thomas Foseid, serves both as the trustee of Kari's special needs trust and as Kari's agent, with power of attorney over Kari's financial affairs.

¶5 In October 2013, approximately 17 years after Mary Jane had the settlement money transferred to her children, Robbins wrote to Thomas requesting that, in his role as power of attorney for Kari, Thomas demand from Walters an accounting of the money that had been transferred to Walters. This accounting would have required Walters to provide detailed information regarding where she was holding or investing settlement money that she had received, and how she had spent the money, if at all, since she received it. Robbins further requested that Thomas demand that "all remaining funds" from the transfer to Walters be placed in Kari's trust.² Thomas declined to take either step.

² It is unclear precisely what Robbins intended to convey by requesting that "all remaining funds" be placed in a trust for Kari, but the precise meaning does not matter to any issue raised on appeal. We assume that Robbins' requests to the circuit court and now on appeal relate only to that portion of the settlement money transferred to Walters that Robbins contends was to be held for Kari's benefit, and not to the entire amount that Walters received. For the sake of clarity, we will refer to the settlement money that we understand to be the focus of Robbins' requests as the "disputed share," based on the fact that Robbins now disputes it.

¶6 Robbins subsequently filed the petition underlying this action. Robbins asked the circuit court to impose a constructive trust for Kari's benefit on the disputed share, or to invoke the court's authority, pursuant to WIS. STAT. § 244.16(1),³ to review Thomas' conduct as Kari's power of attorney, and order Thomas to demand an accounting from Walters of this money and to direct that the disputed share be placed in trust for Kari.

¶7 Robbins filed a motion for summary judgment, asking the court to grant her petition and to order that Walters place the disputed share into a constructive trust for Kari's benefit. The circuit court denied Robbins' motion, granted summary judgment to both Thomas and Walters, and dismissed Robbins' petition.

¶8 The circuit court's decisions rested on its conclusion that the summary judgment evidence established that Mary Jane intended to transfer the disputed share to Walters without restriction, and that there is no reasonable inference to the contrary from the summary judgment evidence. That is, the court concluded that there was no reasonable inference from the undisputed evidence that Mary Jane placed any restriction, written or oral, on how Walters was to use the disputed share.

¶9 The circuit court explained that the summary judgment evidence did not include evidence of restrictions, either when the settlement proceeds were

³ WISCONSIN STAT. § 244.16(1) grants certain persons the right to petition the circuit court to "review" a power of attorney agent's "conduct," and to "grant appropriate relief" in connection with the power of attorney. It is not disputed here that Robbins is a person entitled to obtain this relief, putting aside the merits of her petition. All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

initially distributed through Mary Jane’s attorney, or when Mary Jane’s plans for Kari were memorialized one year later, via her estate plan.⁴ The court also placed significance on the fact that the attorney who distributed the settlement money, the same attorney who later established Mary Jane’s estate plan, averred that he did not recall that Mary Jane had told the attorney anything about how the settlement money had to be used by any child, and that he did not recall providing advice to Mary Jane in this regard. Absent evidence that Mary Jane intended to restrict Walters’ use of the disputed share, the court concluded that Mary Jane intended it as an unrestricted transfer to Walters. For these reasons, the circuit court declined to take either step requested in Robbins’ petition: imposing a constructive trust on any “remaining funds” from the disputed share, or reviewing Thomas’ conduct and ordering Thomas to demand an accounting of the disputed share.

¶10 Robbins appeals, and Walters and Thomas respond with separate briefs that heavily overlap in substance.

DISCUSSION

¶11 While the parties do not frame their arguments on appeal in the context of our review of grants of summary judgment, all of the parties agree in substance that the answer to one question is dispositive: is there a genuine issue of fact, based on the summary judgment evidence, that Mary Jane intended to make an unrestricted transfer to Walters and only a nominal transfer to Kari?

⁴ The parties and the circuit court appear to have believed or assumed that Mary Jane could have placed valid restrictions on the transfer of the settlement money to Walters at one or more junctures *after* the transfer was complete, through, for example, provisions in her estate plan or a codicil to her will. We express no view on the question of whether such post-transfer restrictions would have been valid, but instead assume without deciding that Mary Jane could have imposed restrictions after the transfer.

¶12 As summarized above, the circuit court concluded, based on the summary judgment record, that there was no genuine issue of fact on the question of whether Mary Jane intended to make an unrestricted transfer of the settlement money to Walters. As we now explain, we reach the same conclusion on our de novo review.

I. Governing Legal Standards

¶13 We review a circuit court’s decision on summary judgment de novo, applying the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). It is sufficient here to note only the following regarding the familiar summary judgment methodology. We affirm a summary judgment when there are no genuine issues of material fact and a party is entitled to judgment as a matter of law. *See Hoida, Inc. v. M & I Midstate Bank*, 2006 WI 69, ¶16, 291 Wis. 2d 283, 717 N.W.2d 17. The court may grant summary judgment to a non-moving party if it concludes that the non-moving party is entitled to summary judgment as a matter of law. WIS. STAT. § 802.08(6); *see also Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 2003 WI 46, ¶19, 261 Wis. 2d 333, 661 N.W.2d 789.

¶14 Turning to the separate topic of circuit court decisions whether to impose constructive trusts, such decisions fall within a court’s equitable authority. *See Singer v. Jones*, 173 Wis. 2d 191, 194, 496 N.W.2d 156 (Ct. App. 1992). “We review the trial court’s decision to impose a constructive trust under an erroneous exercise of discretion standard.” *Pluemer ex rel. Buggs v. Pluemer*, 2009 WI App 170, ¶9, 322 Wis. 2d 138, 776 N.W.2d 261. We “will search the record for reasons” to uphold the circuit court’s decision not to impose a constructive trust on the funds, given the equitable and discretionary nature of that

decision. See *Roy v. St. Luke's Med. Ctr.*, 2007 WI App 218, ¶11, 305 Wis. 2d 658, 741 N.W.2d 256 (“Given that the exercise of discretion is fundamental to the trial court’s ability to fulfill its role in the legal system, ‘we will search the record for reasons to sustain its exercise of discretion.’” (quoted sources omitted)).

¶15 “As a general rule, a transfer of property from a parent to a child without explanatory words creates a presumption that the transfer was intended as a gift.” *Rohde v. Skomski*, 8 Wis. 2d 50, 51, 98 N.W.2d 440 (1959). Robbins fails to address *Rohde* in her principal brief, and notes only in her reply brief that the court in *Rohde* addressed the difference between a gift and a loan, not the difference between a gift and a restricted transfer. However, even at this late stage in the briefing process, Robbins does not develop a legal argument that this difference could matter, and instead stakes her argument on the proposition that “this was not a transfer without ‘explanatory words.’” (Quoted source omitted.) We therefore take Robbins to effectively concede that the *Rohde* presumption applies in this context, and stands for the proposition that a transfer of property from a parent to a child without explanatory words creates a presumption that the transfer was intended as an unrestricted transfer.

¶16 Pursuant to WIS. STAT. § 903.01, a party relying on a presumption that is “recognized at common law” has “the burden of proving the basic facts,” creating the presumption. However, “once the basic facts are found to exist the presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.” *Id.*

II. Mary Jane's Donative Intent

¶17 As stated above, the question is whether Mary Jane intended to transfer the now disputed share to Walters without restriction. Although Robbins fails to frame her argument in the summary judgment context, we take her to contend that the summary judgment evidence supports only one conclusion: Mary Jane transferred the disputed share to Walters for her to hold and use exclusively for Kari's benefit. We reject this argument. Walters testified that she understood that the money was intended as an unrestricted transfer to her, and our independent review of the record reveals no evidence upon which a factfinder could make a finding rebutting the presumption that the transfer to Walters was unrestricted.

¶18 In primary support of her argument, Robbins points to evidence that Mary Jane did not transfer Kari more than a nominal share out of fear that transferring more would have jeopardized Kari's eligibility for public assistance. Robbins argues that this evidence conclusively shows that Mary Jane intended to transfer the disputed share to Walters with restrictions because "[i]t is not possible to have it both ways"—if Mary Jane transferred to Walters, instead of Kari, the disputed share in order to prevent Kari from losing public assistance, then Mary Jane could not possibly have given the disputed share to Walters to do with as she pleased, it must have been for Kari's benefit. For this reason, Robbins argues, the court erred in reaching the conclusion that the evidence and the reasonable inferences from that evidence all pointed in the opposite direction.

¶19 Walters and Thomas argue that Robbins fails to rebut the presumption that the transfer to Walters was unrestricted. In their view, Robbins offers no evidence that Mary Jane directed Walters to put any of the money transferred to Walters into a trust for Kari. Instead, they argue, Mary Jane

demonstrated her concern for Kari's well being shortly after the settlement money was distributed by establishing her estate plan with Kari in mind and setting up the special needs trust for Kari's benefit, to be funded through Mary Jane's estate upon her death.

¶20 We conclude that the record lacks any evidence that Mary Jane intended for Walters to hold any of the disputed share solely for Kari's benefit when Mary Jane directed that her attorney distribute the settlement money to Walters, or at any time thereafter. We reject Robbins' argument that it is reasonable to infer from evidence that Mary Jane was aware of, and concerned about, Kari's public assistance eligibility requirements, that Mary Jane meant to restrict Walters' use of the disputed share to use for Kari's benefit. This is a huge leap. The mere fact that Mary Jane was aware of the public assistance issue does not create even a mild inference to support a finding in favor of Robbins' position.

¶21 In fact, the reasonable inferences from the evidence on this topic cut in the other direction, and directly undermine Robbins' position. The evidence shows that Mary Jane believed that she could use a method that did not involve transfers of settlement money to provide for Kari's needs after Mary Jane's death, and which would *not* imperil Kari's public assistance, namely, through the special needs trust that Mary Jane had her attorney create.

¶22 Our conclusion rests on the undisputed facts surrounding the transfers of the settlement money, the creation of Mary Jane's estate plan (with its special needs trust for Kari), and the lack of evidence that Mary Jane restricted Walters' use of the settlement proceeds during the course of any of this activity. The record lacks any evidence that Mary Jane intended that Walters use the disputed share to fund Kari's trust by, for example, directing that the disputed

share be placed into the special needs trust that Mary Jane created after the settlement proceeds were distributed.

¶23 In her only other argument of potential substance, Robbins points to “third-party evidence” that she argues supports her position on Mary Jane’s donative intent. However, this consists of statements from two of her siblings that amount to nothing more than their otherwise unsupported opinions that they believed that Walters was required to, and intended to, use the disputed share for Kari’s benefit. Unsupported opinions about what Walters was required to do are not evidence, and evidence that Walters intended to use some of the disputed share for Kari’s benefit is not probative on the question of Mary Jane’s intent.

¶24 For these reasons, we conclude that the summary judgment record reveals no genuine issue of fact on the question of whether Mary Jane intended the distribution of the disputed share to Walters to be unrestricted. The evidence and all reasonable inferences arising from the evidence support the presumption that there was no restriction on Walters’ use of the disputed share, and Robbins fails to rebut this presumption.

III. Constructive Trust

¶25 Robbins argues that the circuit court erroneously exercised its discretion in declining to impose a constructive trust on any “remaining funds” from the disputed share, and that the evidence that was before the circuit court shows that Walters has been unjustly enriched by her receipt of the disputed share, in light of what Robbins asserts was Mary Jane’s donative intent at the time of the transfer. As should be readily apparent by now, based on the discussion above, we conclude that the court did not erroneously exercise its discretion.

¶26 A constructive trust is an equitable method to impose liability “to prevent unjust enrichment and unfairness.” *Richards v. Richards*, 58 Wis. 2d 290, 296, 206 N.W.2d 134 (1973). It is

“a remedial device for the protection of a beneficial interest against one who 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 (quoted source omitted). Wrongful conduct by the person holding the property is not a necessary prerequisite to imposition of a constructive trust. *See Sulzer v. Diedrich*, 2003 WI 90, ¶23, 263 Wis. 2d 496, 664 N.W.2d 641.

¶27 Robbins does not argue that Walters engaged in wrongdoing in *accepting* the disputed share from Mary Jane. However, Robbins asks us to conclude that the circuit court erroneously exercised its discretion in declining to exercise its equitable authority to impose a constructive trust on the disputed share because Walters is wrongfully *retaining* it and that the equities favor the imposition of a constructive trust on it.

¶28 The problem is that, given our conclusion that Robbins fails to point to evidence that would rebut the presumption that Mary Jane intended to make an unrestricted transfer to Walters, there is nothing left of the argument that Walters has been unjustly enriched. If the disputed share was transferred for Walters to use as she sees fit, then she has neither “obtained [n]or holds the legal title to property which [s]he ought not in equity and in good conscience beneficially enjoy.” *See Gorski v. Gorski*, 82 Wis. 2d 248, 254-55, 262 N.W.2d 120 (1978) (quoted source omitted). Similarly, Robbins’ argument that Walters is wrongfully

retaining possession of the settlement money falls away when the disputed share is understood to be an unrestricted transfer.

¶29 Robbins recycles her point about public assistance addressed above, and it is again unavailing in this context. Robbins argues that “but for Kari’s disabilities and reliance on public assistance, [Kari’s share] would have gone to Kari” rather than Walters—since there would have been no need for Mary Jane to avoid a transfer that would have reduced Kari’s public assistance—and therefore Walters has been unjustly enriched and is wrongfully retaining the money. Assuming without deciding that the evidence supports the proposition that, but for Kari’s need for public assistance Kari would have received an equal share, the question here is not who could accept or retain the disputed share *if Kari’s circumstances had been different*. The question is what Mary Jane intended to do with the money given the actual circumstances, including Kari’s circumstances. Walters received what could have been Kari’s share as an unrestricted transfer from Mary Jane for the assumed reason that circumstances were such that this money could not productively be transferred to Kari. We conclude that there is no evidence of wrongdoing surrounding the initial transfer of the money to Walters and that the transfer was unrestricted.

¶30 In sum, our review of the record demonstrates that the circuit court “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.” *See Pluemer*, 322 Wis. 2d 138, ¶9. Specifically, the court considered the relevant material facts, which the parties agreed were undisputed, considered its equitable authority to construct a trust, evaluated the evidence before it on summary judgment, and reasonably declined to impose a constructive trust on the settlement money.

IV. Refusal to Demand an Accounting

¶31 In addition to challenging the circuit court’s decision not to impose a constructive trust, Robbins also challenges the court’s discretionary decision not to order Thomas to demand an accounting from Walters regarding the disputed share and to require that any “remaining funds” be placed in trust. Robbins argues that the circuit court misinterpreted its authority under WIS. STAT. § 244.16(1) in analyzing Robbins’ accounting request. Because the statute, on its face, gives the court the authority to “review the agent’s conduct, and grant appropriate relief,” *id.*, Robbins contends that the circuit court erred in determining that, as Robbins’ argument proceeds, the court was obligated to defer to Thomas’ decision not to demand an accounting. We disagree.

¶32 A court has authority to review the conduct of a power of attorney and to demand an accounting or other appropriate relief as warranted, under authority of WIS. STAT. § 244.16. However, we reject Robbins’ positions that the circuit court erroneously exercised its discretion in declining to do so here, and that the circuit court’s decision not to order Thomas to demand an accounting from Walters was based on the court’s misinterpretation of the statute.

¶33 Drawing our attention to a general statement by the court that it defers to a power of attorney’s decisions, Robbins argues, without citation to legal authority, that this statement amounted to a misapplication of the statute and the proper legal standards. However, assuming without deciding that a court reviewing a power of attorney’s conduct in the context of WIS. STAT. § 244.16 owes no deference whatsoever to the independent decision-making authority of a power of attorney, the court provided an alternative, reasonable basis for its discretionary decision not to order the accounting. The court found that Thomas’

“conduct has been appropriate,” because Walters was entitled to accept, retain, and use the disputed share without restriction. The court explained that it did not “see any factual basis for [the court] to create another trust.” The “factual basis” referred to by the court was evidence that could rebut the presumption that Mary Jane intended the settlement money as an unrestricted transfer to Walters. We have explained that this “factual basis” is lacking.

CONCLUSION

¶34 For these reasons, we conclude that the circuit court did not err in granting summary judgment and that the court did not erroneously exercise its discretion in declining to impose a constructive trust or to enter an order demanding an accounting.

By the Court.—Order affirmed.

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

