

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 19, 2016**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2014AP2759**

**Cir. Ct. No. 2012CV1078**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**ALONDRA PLYMIRE,**

**PLAINTIFF-APPELLANT-CROSS-RESPONDENT,**

**V.**

**CYNTHIA ROMNEK,**

**DEFENDANT-RESPONDENT-CROSS-APPELLANT,**

**DEPARTMENT OF EMPLOYEE TRUST FUNDS,**

**DEFENDANT.**

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APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Outagamie County: GREGORY B. GILL, JR., Judge. *Reversed.*

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

¶1 PER CURIAM. At the time of James Plymire’s death, his sister, Cynthia Romnek, was listed as the primary beneficiary for his retirement account and a life insurance policy. James’ wife, Alondra Plymire, was listed as the secondary beneficiary. Following James’ death, Alondra commenced this lawsuit, asking the circuit court to establish a constructive trust for her benefit over the retirement account and life insurance proceeds. The court ultimately ordered the establishment of a constructive trust in the amount of \$110,000 to pay Alondra’s educational expenses and a constructive trust in the amount of \$100,000 to pay educational and medical expenses for Cynthia’s daughter, Rachael Romnek.

¶2 Alondra appeals, asserting the circuit court erred by: (1) limiting the amount of the constructive trust for her benefit to \$110,000 and ordering that those funds be used only for educational expenses; (2) declining to award her attorney fees; and (3) establishing a constructive trust for Rachael’s benefit. Cynthia cross-appeals, arguing the court erred by establishing a constructive trust for Alondra’s benefit and denying Cynthia’s motion for reconsideration. We conclude the court erred by establishing both constructive trusts. We therefore reverse.

## **BACKGROUND**

¶3 James worked as a police officer for the City of Neenah. As such, he had a retirement account and life insurance policy through the Wisconsin Department of Employee Trust Funds (ETF). In July 2010, Alondra was hired by the Neenah Police Department as a community service officer. James and Alondra began dating in fall 2010. James was forty-eight years old at the time, and Alondra was twenty.

¶4 Alondra moved into James' residence in March 2011. Shortly thereafter, James was diagnosed with colon cancer. James and Alondra became engaged in November 2011. On December 28, 2011, James executed a beneficiary designation form for his ETF retirement and life insurance benefits naming his sister, Cynthia, as the primary beneficiary and Alondra as the secondary beneficiary. In January 2012, James learned that his colon cancer was terminal.

¶5 James and Alondra were married on June 5, 2012. On June 22, James was placed on home hospice care. On July 2, he was admitted to Cherry Meadows hospice center. During the admission process, Alondra had to sign a form on James' behalf because he was too weak to do so. James returned home on July 4 and died two days later.

¶6 Two days after James died, Alondra sent a new beneficiary designation form to ETF, which James had purportedly signed on July 2, the same day he was admitted to Cherry Meadows. The July 2 beneficiary designation named Alondra as the primary beneficiary for James' ETF benefits, named Cynthia as the secondary beneficiary, and named Alondra's sister as the tertiary beneficiary. ETF rejected the July 2 beneficiary designation because it was not received until after James' death. According to ETF, the December 28, 2011 beneficiary designation naming Cynthia as the primary beneficiary controlled the disposition of James' benefits.

¶7 Alondra sued Cynthia and ETF on July 31, 2012, asking the circuit court to impose a constructive trust in her favor over James' ETF benefits. A four-day bench trial on Alondra's claim was held in April 2014.

¶8 At trial, Alondra testified James asked her to call ETF on June 22, 2012, the same day he was placed on hospice care. Together, they spoke by phone with ETF employee Megan Jeffers. James told Jeffers he wanted to update his beneficiary designation to list Alondra as the primary beneficiary for his ETF benefits. Jeffers instructed James to fill out a new beneficiary designation form. Alondra printed the form from the internet a few days later. She testified she filled out the form on July 2, 2012, pursuant to James' instructions, and James then signed it.

¶9 Jeffers confirmed she spoke to James by phone on June 22, 2012. During that conversation, James asked who was listed as the beneficiary for his ETF benefits. Jeffers responded she could not reveal that information over the phone, but she suggested James "could name whom he wanted to by submitting a new beneficiary designation form." Jeffers then sent James or Alondra an email containing a link to download a beneficiary designation form. The same day, Jeffers sent an email to a colleague at ETF stating that James was "in the process of submitting an updated beneficiary form listing [Alondra] as primary."

¶10 Meredith DeKalb Miller, a forensic document examiner experienced in handwriting comparison and analysis, provided expert testimony regarding the July 2, 2012 beneficiary designation form. Miller testified she was "virtually certain" the signature on the form was not written by James.

¶11 Several other witnesses testified at trial regarding James' statements concerning how he wanted his assets to be distributed after his death. For instance, one of James' colleagues, lieutenant Jeffrey Malcore, testified James "stated that he wanted some things to go to Alondra, some things to go to [Rachael], the niece, and some things to go to [Cynthia]." When asked whether he

believed James would have named Alondra as the sole beneficiary of his ETF benefits, Malcore responded, “I would believe he would leave it to [Cynthia], not to Alondra, because he did make many comments that Alondra wasn’t very good with money and he felt [Cynthia] would be able to be more fair with it.”

¶12 Lieutenant Shaun O’Bre, another of James’ colleagues, similarly testified James stated a few months before his death that he

was planning on having [Cynthia] being the primary beneficiary and then she would—his idea was for her to give out a stipend, an allowance to Alondra because of his concerns that she was so young she couldn’t manage money well, and he had concerns about how she managed money in general, and he said when he mentioned that to Alondra she was extremely upset.

¶13 Another colleague, sergeant Christine Walsh, testified she spoke with James about the disposition of his assets three or four times before he married Alondra, and James stated

he wanted [Cynthia] to have the majority of his money so [Rachael] would be taken care of ... because he knew [Cynthia] would take care of [Rachael]. He told me that he did not want Alondra to have all of his money, large sums of his money because he didn’t think she would be able to handle that amount of money and that he did not want any of the money to go to her father.

Walsh testified James “wanted [Alondra] to have enough to either go back to school, get an education, get settled, get a job and work like we all do.” However, he also wanted to provide for Rachael, who was losing her vision, because “her future would be very rough as a blind person in this society.”

¶14 Other witnesses similarly testified James wanted to leave Alondra enough money to go back to school. In addition, one witness testified James stated he wanted to “take care” of Alondra.

¶15 In an oral ruling, the circuit court rejected Alondra’s claim that James signed the July 2, 2012 beneficiary designation. The court found Alondra’s testimony to that effect “suspicious” and “uncredible” and credited Miller’s expert testimony that the signature on the form was not written by James. The court therefore stated there was “no merit to the argument that Alondra should receive [James’] full state retirement benefits.” However, the court concluded Alondra had an “equitable claim” to at least part of those benefits, based on various witnesses’ testimony that James wanted “to take care of Alondra’s schooling.” Because Cynthia was the sole beneficiary of the funds, the court concluded there “could be an unjust result” without court intervention. The court therefore concluded the first requirement for the imposition of a constructive trust was satisfied.

¶16 Turning to the second requirement, the court concluded Cynthia’s entitlement to James’ ETF benefits was the result of a “mistake.” The court reasoned:

In this case there is reason to believe that [James] wanted to provide for his wife. This ... conclusion is reached based upon a number of things: The comments made to friends, the wedding which proceeded shortly before his death, and perhaps most significant the fact that he was on the phone when a change of beneficiary form was requested. ...

To that same end, there appears to be a general consensus that [James] deteriorated rather rapidly at the end, battling weakness, tiredness and knowledge that death was knocking. These factors do not make it unreasonable that he did not effectuate any final changes as desired due to his mind being elsewhere, i.e. a mistake.

¶17 The court therefore concluded the imposition of a constructive trust for Alondra’s benefit was appropriate. However, the court limited the amount of the trust to \$110,000 and stated the money could be used only for educational

expenses. The court further ordered that a constructive trust in the sum of \$100,000 be established for Rachael's medical and educational expenses. The court stated, "[T]he same factors considered with respect to [Alondra's] trust warrant the creation of this second trust." Finally, the court declined to award either Alondra or Cynthia attorney fees or costs.

¶18 Both Alondra and Cynthia filed motions for reconsideration, which the circuit court denied. Alondra now appeals, and Cynthia cross-appeals.

### DISCUSSION

¶19 We review a circuit court's decision to impose a constructive trust using the 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. "Discretionary acts are sustained if the trial 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." *Id.* (quoting *Parge v. Parge*, 159 Wis. 2d 175, 179, 464 N.W.2d 217 (Ct. App. 1990)).

¶20 A constructive trust is "an equitable device used to prevent unjust enrichment which arises when a party receives a benefit the retention of which is unjust to another party." *Sulzer v. Diedrich*, 2003 WI 90, ¶20, 263 Wis. 2d 496, 664 N.W.2d 641. Two requirements must be met before a court may impose a constructive trust. First, legal title to the property "must be held by someone who in equity and good conscience should not be entitled to beneficial enjoyment." *Wilharms v. Wilharms*, 93 Wis. 2d 671, 679, 287 N.W.2d 779 (1980). Second, title must 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.*

¶21 In this case, the circuit court erroneously exercised its discretion by establishing constructive trusts over James' ETF benefits for the benefit of Alondra and Rachael. Assuming without deciding that the court properly concluded the first requirement for imposition of a constructive trust was met with respect to both Alondra and Rachael, the court erred by concluding the second requirement was met. Regarding Alondra, the court concluded James' failure to list Alondra as the primary beneficiary for his ETF benefits constituted 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; or where the donor mistakenly believes that the recipient is legally entitled to the property conveyed. There may be a mutual mistake which both parties share, or a unilateral mistake. It may also refer to a mistake arising when property is not conveyed which the grantor intended to convey.

*Id.* at 680 n.2 (citing A. SCOTT, 5 LAW OF TRUSTS, §§ 465-67 (3d ed. 1967)). However, the mistake must be a mistake of fact, rather than a mistake of judgment. *Cayo v. Cayo*, 117 Wis. 2d 154, 158-59, 342 N.W.2d 785 (Ct. App. 1983).

¶22 Here, the circuit court could reasonably conclude, based on the evidence adduced at trial, that James wanted Alondra to receive at least some of his ETF benefits so she could go back to school and, further, that James contacted ETF about making Alondra the primary beneficiary of the benefits shortly before his death. The evidence also supported the circuit court's conclusion that, despite James' intent, he failed to sign a new beneficiary designation form naming Alondra as the primary beneficiary. James' failure to do so, however, was not a mistake of fact. There is no allegation in this case that James filled out the



beneficiary designation form incorrectly—for instance, by listing the wrong person as beneficiary. There is no allegation that he completed the form but mistakenly mailed it to the wrong address. Instead, the circuit court reasonably concluded James failed to sign a new beneficiary designation form due to the rapid deterioration of his condition, particularly his increased weakness and fatigue. Those circumstances, understandable though they may be, do not constitute a mistake of fact under the law.

¶23 A comparison of this case with *Cayo* is instructive. In *Cayo*, Linda Cayo executed a will and revocable living trust naming her son as sole beneficiary. *Cayo*, 117 Wis. 2d at 156. Slightly more than nine months later, she gave birth to a daughter, Meghan. *Id.* Linda died three years after Meghan’s birth, without changing any provisions of the will or trust. *Id.* Meghan’s guardian ad litem argued a constructive trust should be imposed on Linda’s estate for Meghan’s benefit. *Id.* at 158. We rejected that argument, reasoning Linda’s failure to amend the will and trust to include Meghan was not a “mistake,” for purposes of the constructive trust analysis. *Id.* at 158-59. We explained:

Such a mistake would refer to a mistake of fact made at the time the trust was executed and not a subsequent change of circumstances. *See* 89 C.J.S. *Trusts*, § 74 (1955). However, the evidence in the record indicates that prior to her death, Linda was warned by her attorney to make changes in both her will and trust. Yet, she failed to do so. Linda’s failure to include Meghan in the trust was a mistake of judgment on her part, not a mistake of fact. Since there is no evidence in the record that Linda mistakenly omitted Meghan at the time the trust was drafted, we affirm the trial court’s decision not to impose a constructive trust.

*Id.* Similarly, in this case, James’ failure to change the beneficiary designation for his ETF benefits, if a mistake at all, was, at most, a mistake of judgment. It did not constitute a mistake of fact.

¶24 Alondra emphasizes the *Wilharms* court’s statement that the term “mistake” may also refer “to a mistake arising when property is not conveyed which the grantor intended to convey.” *Wilharms*, 93 Wis.2d at 680 n.2. Alondra argues that is what happened here—James intended his ETF benefits to be conveyed to her following his death, but because of his failure to update the beneficiary designation, ETF determined Cynthia was entitled to the property. However, regardless of James’ intent, a mistake for purposes of the constructive trust analysis must be a mistake of fact. *See Cayo*, 117 Wis.2d at 158-59. Alondra does not effectively distinguish *Cayo* or cite any case in which a constructive trust was properly imposed based on a “mistake” other than a mistake of fact.

¶25 The circuit court also erroneously exercised its discretion by establishing a constructive trust for Rachael’s benefit. The court stated the same factors that supported the establishment of Alondra’s constructive trust also warranted the creation of a constructive trust for Rachael. Again, however, there is no evidence that James’ failure to designate Rachael as a beneficiary of his ETF benefits was a mistake of fact. The evidence at trial showed that James made several statements to coworkers about his desire to provide for Rachael due to the challenges she would face as a result of her vision loss, but there was no evidence he ever took any steps to name Rachael as a beneficiary of his ETF benefits. Moreover, one witness testified at trial that James indicated he wanted the ETF funds to go to Cynthia because Rachael was a minor and Cynthia would “make sure that [Rachael] got the money.” On these facts, the circuit court could not reasonably conclude James’ failure to name Rachael as a beneficiary was the result of a mistake of fact.

¶26 In summary, because the evidence did not establish that James made a mistake of fact by failing to name either Alondra or Rachael as a beneficiary of his ETF benefits, the circuit court erroneously exercised its discretion by establishing constructive trusts over those funds for Alondra's and Rachael's benefit. Because we reverse the judgment and order on these grounds, we need not address the parties' remaining arguments. *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (appellate court need not address every issue raised by the parties when one is dispositive).

*By the Court.*—Judgment and order reversed.

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

