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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

SALEM EVANGELICAL LUTHERN CHURCH and LOREN and LORI JOHNSON

Plaintiffs - Respondents,

-vs-

Appeal No. 2013AP002064

Circuit Court No. 2013CV000001

JULIETTE KANGAS

Defendant - Appellant.

Appeal From The Decision Of
The Circuit Court For Iron County
The Honorable Patrick Madden, Circuit Judge, Presiding

BRIEF OF DEFENDANT – APPELLANT JULIETTE KANGAS

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Defendant - Appellant, Juliette Kangas, (Juliette) does not believe that oral argument is necessary. Juliette also does not believe that publication of the Decision is warranted in this case.

STATEMENT OF THE CASE

This case involves the proper disposition of an investment account held by the investment firm of Edward D. Jones & Company (herein called "Edward Jones account" and "Edward D. Jones", respectively). Before January 5, 1995, Jean B. Orsoni (Orsoni) and her husband, Andrew Orsoni, were the owners of the Edward Jones account. (R-55, 9-10). The Plaintiffs-Respondents ("Plaintiffs") claim that, after the deaths of both Andrew and Jean Orsoni, the disposition of the Edward Jones account should have been governed by The Jean B. Orsoni Revocable Living Trust and First Amendment To Trust ("Trust") under which Plaintiffs are beneficiaries. (R-26, Exhibit 6). [1] However, Juliette claims that the account was rightfully distributed to her as the surviving joint tenant of that account.

The Plaintiff's Complaint alleged that Juliette was Orsoni's agent under the Power of Attorney; that Juliette had been in a fiduciary relationship with Orsoni; and that Juliette stood in a confidential relationship with Orsoni. (R-1, 3, 4, 5). Juliette's Answer and testimony did not dispute any of that. (R-3, R-55,

[1] The Circuit Court's Index to the Record number 26 contained all of the Trial Exhibits but the Index did not number the pages. Therefore, by necessity, this Brief must refer only to the Exhibit numbers of R-26 rather than the page numbers.

11). The Complaint alleged that under the Trust, ten percent (10%) of the Trust estate was to go to Plaintiff Salem Evangelical Lutheran Church and fifteen percent (15%) of the Trust estate was to go to Plaintiffs Loren and Lori Johnson. (R-1, 4). Juliette's Answer admitted that. (R-3). The Complaint alleged that Juliette failed to distribute to the Plaintiffs the amounts owed under the terms the Trust. (R-1, 4). Juliette's Answer admitted that she did not distribute the Edward Jones account in accordance with the Trust, but alleged that she was not obligated to do so. (R-3, 1). Juliette's Answer alleged that the Edward Jones account was not a Trust asset, and that Juliette was entitled to the entire Edward Jones account as the surviving joint tenant of that account. (R-3, 1). The Complaint alleged that Juliette conferred upon herself a benefit that in equity and good conscience she ought not be allowed to retain. (R-1, 5). Juliette's Answer denied that. (R-3, 2). The Complaint claimed that, in failing to treat the Edward Jones account as subject to the Trust, Juliette acted in bad faith and conscious disregard for her duty as a trustee. (R-1, 5). Juliette's Answer denied that. (R-3, 2). The Complaint demanded imposition of a constructive trust upon the balance in the Edward Jones account. (R-1, 5). Juliette's Answer demanded dismissal with prejudice. (R-3, 3). Juliette's Answer also set up Affirmative Defenses that will be discussed later in this Brief.

STATEMENT OF FACTS

Juliette Kangas was Jean Orsoni's niece-in-law, her closest living relative, caretaker and life-long friend. (R-55, 9, 30-31). Juliette and Orsoni were friends for sixty some years. (R-55, 29). Juliette saw Orsoni on a daily basis. (R-55, 31-33). No relative of Orsoni lived near Orsoni in the Hurley area other than Juliette. (R-55, 30). When Orsoni was older, before her death in 2010, only Juliette took care of Orsoni. (R-55, 32).

On December 19, 1994, Orsoni signed a General Durable Power of Attorney ("Power"). (R-26, Exhibit 2). The Power was drafted by Orsoni's Attorney Paul Sturgul. (R-55, 130). Attorney Sturgul represented Orsoni, not Juliette. (R-55, 11, 130). The Power name Juliette as Orsoni's agent (attorney-in-fact). (R-26, Exhibit 2, R-55, 34). Significantly, paragraph 21 of the Power granted Juliette the power to:

> 21. Make gifts of any kind, including gifts to my agent, in accordance with my testamentary plan and to make gifts of any kind, including gifts to my agent, *in accordance with my pattern of gift giving.* (Emphasis added). (R-26, Exhibit 2, R-55, 136)

Juliette's testimony was undisputed that Orsoni's pattern of gift giving was only to Juliette and her children. (R-55, 53-56). Jean Orsoni gave $20,000 to Juliette's children, Mark and Nancy Kangas. (R-55, 53). Orsoni gave $20,000 to Juliette's daughter, Susan Rojala. (R-55, 53, 178). Orsoni gave $30,000 to Juliette's son Gary Kangas. (R-55, 54). Orsoni named Juliette as the sole beneficiary on an

approximate $57,000 annuity she had at Edward D. Jones, which was part of the Edward Jones account. (R-55, 55). In 2006, Orsoni gave her home to Juliette. (R-26, Exhibit 15, R-55, 55-56). There was no evidence at trial that Orsoni ever made any gifts to the Plaintiffs, or anyone other than Juliette and her children. (R55, 56,136).

Attorney Sturgul testified that Orsoni was a strong-willed, self-confident person, who handled her own financial matters. (R-55, 105, 132-133). Juliette's uncontroverted testimony was that Orsoni was a sophisticated investor, with a business school education, savings and loan and other business experience, who made her own decisions about her investments. (R-55, 35). From 2004 to 2007, Orsoni handled her own investments and Juliette never acted as Orsoni's agent under the Power of Attorney. (R-55, 36). On January 5, 1995, shortly before the death of her husband, Andrew Orsoni, Jean Orsoni signed an account transfer form with Edward D. Jones transferring the entire Edward Jones account into the sole name of Juliette Kangas. (R-26, Exhibit 4, R-55, 37-40, 137-140, 179-180). Juliette signed the transfer form as agent for Andrew Orsoni under his Power of Attorney. (R-26, Exhibits 1 and 4, R-55, 34, 39).

In 1995 Attorney Sturgul learned that Orsoni transferred the account to Juliette. (R-55, 41-42, 142). On March 21, 1995, Attorney Sturgul's associate, Brian Tarro, testified that he took Orsoni to Edward D. Jones for the purpose of getting the account back into Orsoni's sole name. (R-55, 92-95). However,

Orsoni and Juliette never did transfer the account back into Orsoni's sole name. (R-55, 95-96). Orsoni's Edward Jones Investment Advisor, David Riegler, testified that Edward D. Jones never received any request to transfer the account back into Orsoni's sole name. (R-55, 188-189).

Some seventeen months after Orsoni transferred the Edward Jones account to Juliette, on September 30, 1996, Orsoni signed The Jean B. Orsoni Revocable Living Trust ("Trust"). (R-26, Exhibit 6, R-55, 11-12, 21-22, 105, 144). The Trust was drafted by Orsoni's Attorney Paul Sturgul. (R-55, 105). According to Mr. Sturgul, Juliette was not present when Orsoni signed the Trust. (R-55, 144). Among other beneficiaries, the Trust granted ten percent (10%) of the Trust estate to Plaintiff Salem Evangelical Lutheran Church and fifteen percent (15%) of the Trust estate to Plaintiffs Loren and Lori Johnson. (R-26, Exhibit 6). Orsoni was named as her own Trustee and Juliette Kangas was named Successor Trustee. (R-26, Exhibit 6). Significantly, the second paragraph of the Trust provided that:

> Grantor has transferred *certain* property to the Trustee or caused such Trust to be designated beneficiary of *certain* property. (Emphasis added). (R-26, Exhibit 6, R-55, 148).

By stating that only certain property was to be transferred to the Trust, Orsoni's apparent intent was to not transfer all of her property to the Trust. Attorney Sturgul testified that, normally after a Trust is signed, he transfers assets to the Trust that the client wants transferred to the Trust. (R-55, 146). Here, however,

the Edward Jones account was not transferred to the Trust. (R-55, 44, 59, 151-152). Mr. Sturgul testified that the Trust is unambiguous and did not provide that the Edward Jones account, or any cash assets, were transferred to, owned by, or governed by, the Trust. (R-55, 149-153). Mr. Sturgul testified that Orsoni acted as her own Trustee until she passed away in 2010. (R-55, 145). Mr. Sturgul testified that Juliette never acted as Trustee under the Orsoni Trust while Orsoni was living. (R-55, 164-165). Mr. Sturgul testified that Orsoni could have changed the Trust at any time to provide that the Edward Jones account was to be governed by the Trust. (R-55, 145).

Under paragraph F, the Trust provided that:

> 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 the Trustee or to see to the application of any money paid or property transferred to or upon the order of such Trustee. (Emphasis added). (R-26, Exhibit 6, R-55, 154).

On September 30, 1996, Orsoni also signed a "Pour-over Will" giving all of her estate to the Trust. (R-26 Exhibit 7, R-55, 167). The Will was drafted by Orsoni's Attorney Paul Sturgul. (R-55, 156). At that time, the Edward Jones account was still titled solely to Juliette. (R- 55, 44). Therefore, the Edward Jones account was not part of Orsoni's estate that would pass under Orsoni's Will. (R55, 166). Mr. Sturgul testified that the Will is unambiguous and did not provide

that the Edward Jones account, or any cash assets, were transferred under, or to be governed by, the Will. (R-55, 157).

On September 30, 1996, Orsoni also signed a Declaration of Transfer and Assignment to The Jean B. Orsoni Revocable Living Trust. (R-26, Exhibit 8, R55, 157). That Declaration referred only to tangible personal property and gave a definition of "tangible personal property". That definition did not include any cash assets such as the Edward Jones account. (R-26, Exhibit 8, R-55, 157-158). In addition, on September 30, 1996, Orsoni signed a Quit Claim Deed transferring her homestead real estate to the Trust. (R-26, Exhibit 9, R-55, 153-154, 159).

The Edward Jones account remained in Juliette's sole name for the next approximate nine years, until 2005. (R-55, 44). Juliette testified that, sometime in 2005, she was at Orsoni's home, and happened to see an Edward Jones account Statement lying on a table. Juliette saw that the account was in Juliette's sole name. Juliette thought that it was not right that only her name was on the account. (R-55, 47). Therefore, Orsoni and Juliette went to Edward D. Jones to set up a joint tenancy in the account between Orsoni and Juliette. (R-55, 47-48, 183-184). As mentioned, Orsoni was a competent, strong-willed, self-confident, savvy investor who knew what she wanted to do with her investments. (R-55, 35, 105, 132). On June 30, 2005 and July 17, 2005, respectively, Orsoni and Juliette signed an account transfer form at Edward D. Jones putting the Edward Jones account in the names of Jean Orsoni and Juliette Kangas as joint tenants with right

of survivorship. (R-26, Exhibit 16, herein called “Exhibit 16”, R-55, 51, 80). In that transaction, Juliette was not acting as Orsoni’s agent under the Power of Attorney, because Orsoni was handling her own financial transaction. (R-55, 36). In fact, Juliette never acted as Orsoni’s agent under the Power, from 1994 until sometime in 2007. (R-55, 36).

The account transfer form Exhibit 16 stated in the upper right hand corner “Account Class Code: 02 JOINT”. (R-26, Exhibit 16). Orsoni's Edward D. Jones Investment Advisor, David Riegler, testified that “Account Class Code: 02 JOINT” meant that it was a joint tenancy with right of survivorship. (R-55, 197). The 2005 Exhibit 16 resulted in Edward D. Jones transferring the Edward Jones account into the joint names of Orsoni and Juliette. (R-55, 47, 183-184). Juliette considered the joint re - titling of the account to be a gift to her by Orsoni. (R-55, 48-50). If Orsoni died first, Juliette would own the account. (R-55, 49, 51).

Some five months after the Edward Jones account was placed into joint tenancy, on December 16, 2006, Orsoni then signed a First Amendment to The Jean B. Orsoni Revocable Living Trust. (R-26, Exhibit 10, R-55, 12, 107). Mr. Sturgul drafted that Amendment and testified that the Amendment was unambiguous. (R-55, 164, 165). While that Amendment slightly changed the distribution of the Trust assets, it did not make any reference to the Edward Jones account or any other cash assets being transferred to, owned by, or governed by, the Trust. (R-55, 59, 166). Under that Amendment, Orsoni continued to be the

named Trustee and Juliette was again named as Successor Trustee. (R-26, Exhibit 10, R-55, 13). On December 16, 2006, Orsoni also signed a Certification of Trust. (R-26, Exhibit 11, R-55, 166). That Certification did not refer to the Edward Jones account or any other assets. (R-55, 166). On December 16, 2006, Orsoni also signed a new General Durable Power of Attorney naming Juliette as her agent and her nephew, Douglas Kangas, as her alternate agent. (R-26, Exhibit 13, R-55, 168). Orsoni herself continued to act as her own Trustee. (R-55, 145). On December 16, 2006, Orsoni, as Trustee of the Trust, conveyed her homestead real estate to Jean B. Orsoni. (R-26, Exhibit 14). Then, on the same day, Orsoni signed a Quit Claim Deed gifting her homestead real estate to Juliette Kangas, reserving a life estate. (R-26, Exhibit 15, R-55, 169).

In summary, the Edward Jones account was never titled to the Trust and was not mentioned anywhere in the Trust or Amended Trust. Over the years 1994 through 2006, Jean Orsoni executed a number of other estate planning documents referred to above. At trial, Defendants stipulated that all of those estate planning documents were unambiguous and that none of those documents mentioned the Edward Jones account. (R-55, 169).

On April 4, 2010, Jean Orsoni passed away. (R-55, 29). An April 30, 2010 Edward D. Jones Account Statement was generated the month that Orsoni died. (R-26, Exhibit 5, herein call “Exhibit 5”, R-55, 48). That Statement stated on the second page that the account was “with right of survivorship”. (R-55, 49,

185). Over the years from 2005 to 2007, Mr. Riegler testified that Jean Orsoni received monthly Account Statements from Edward D. Jones, similar to Exhibit 5. (R-55, 186-187). He testified that each of those Statements showed to Orsoni that the joint tenancy was with right of survivorship with Juliette, similar to Exhibit 5. (R-55, 197). Over those years, Mr. Riegler testified that he regularly met with Orsoni and went over the monthly Account Statements with Orsoni. (R-55, 195). Therefore, on regular occasions over those two years, Orsoni was presumably informed by those Statements that the account was held jointly with Juliette with survivorship rights.

The April 30, 2010 Edward Jones account Statement indicated an account value at that time of $906,175.90. (R-26, Exhibit 5). At the time of Jean Orsoni's death, the Edward Jones account was titled to Jean B. Orsoni and Juliette Kangas, as joint tenants with right of survivorship. (R-55, 185). After Orsoni's death, Edward D. Jones transferred the Edward Jones account to Juliette pursuant to the survivorship feature of the joint tenancy. (R-55, 17-18). Between June and August, 2010, Juliette Kangas distributed $612,100.75 from the Edward Jones account to Jean Orsoni's heirs, including some amounts to the Plaintiffs. (R-26, Exhibit 18). Juliette testified that those transfers were gift that she was not obligated to make. (R-55, 17, 64-65). Further facts will be set forth in the Legal Argument portion of this Brief where relevant.

PROCEEDINGS IN THE TRIAL COURT

The case was tried to the Court without a jury on May 30, 2013. The Court ordered the parties to file written post-trial arguments. (R-55, 198). On June 12, 2013, Plaintiff filed their Post-Trial Brief. (R-28). On June 16, 2013, Juliette filed her Final Argument. (R-29). On June 28, 2013, Plaintiffs filed their Plaintiffs' Reply Brief. (R- 30).

On July 23, 2013, the Circuit Court rendered its written Final Decision and Order. (R-33). In its Decision, the Court made the following six critical findings of fact and conclusions of law:

1. There was no corroboration of Juliette Kangas's claim that the Edward Jones account was just given to her. (R- 33, 1).
2. No legal authority is cited to support the claim that Exhibit 16 *by itself* shows that Jean Orsoni clearly intended to create a joint account. (Emphasis added). (R- 33, 1).
3. Based upon these findings, the Court is of the opinion that Ms. Kangas erred in comingling her interest with Jean's by participating in the joint retitling and putting herself in a position where she could frustrate Jean Orsoni' estate planning. (R- 33, 2).
4. 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. (R- 33, 2).

5....Juliette Kangas followed to a large extent the wishes of Ms. Orsoni but reserved a right to veto distributions with which she disagreed. This is a clear breach of the duty of loyalty ... (R- 33, 2-3).

> 6. Juliette Kangas violated the wishes of Ms. Orsoni as regards to her trust... (R- 33, 3).

The Final Decision and Order imposed a constructive trust upon the balance of the Edward Jones account and ordered Juliette to distribute the Edward Jones account in accordance with the Trust. (R-33, 3).

On July 24, 2013, Plaintiffs filed a Motion For Entry of Judgment. (R-34). On August 2, 2013, Juliette filed her Defendant's Objection and Brief On Plaintiffs' Proposed Judgment, Bill of Costs, Interest, and Motions for Double Costs and to Disallow Trustee's Fee. (R-41). The hearing on Plaintiffs' Motion was held on August 16, 2013, and the Court rendered its decision on that Motion on the record. (R-56).

On August 26, 2013, the Court entered Judgment against Juliette, consistent with the August 16, 2013 decision on the record, in the amount of $72,882.16 plus costs and interest to Plaintiff Salem Evangelical Lutheran Church, and $79,236.55 plus costs and interest to Plaintiffs Loren and Lori Johnson. (R- 45). This appeal was filed on September 10, 2013. (R-47)

ISSUES FOR REVIEW

The overall issue is whether the Circuit Court erred in holding that Juliette should have distributed the Edward Jones account in accordance with the terms of the Trust. Specifically, the issues on this appeal are:

1. Was the Edward Jones account gifted by Orsoni to Juliette? Answer by the Circuit Court: No.
2. Did Juliette breach her fiduciary duty to, or confidential relationship with, Orsoni by not distributing the Edward Jones account under the Trust?

   Answer by the Circuit Court: Yes.

3. Did the Orsoni Trust itself preclude Plaintiffs'

   claims? Not answered by the Circuit Court.

4. Was Juliette released from liability to the Plaintiffs under the Power of Attorney?

   Not answered by the Circuit Court.

5. Did Orsoni ratify Juliette's actions in accepting the gift under the Power of Attorney?

   Not answered by the Circuit Court.

STANDARD OF REVIEW

This appeal involves both questions of law and fact. When reviewing a Circuit Court's rulings on the law, the Court of Appeals reviews the issues *de novo*. The Circuit Court's findings of fact will not be set aside unless they are

clearly erroneous. Russ v Russ 2007 WI 83, 302 Wis.2d 264, 273, 734 N.W.2d 874; Wis. Stat. § 805.17(2). A factual finding is not clearly erroneous unless, after accepting all credibility determinations made and reasonable inferences drawn by the fact-finder, the great weight and clear preponderance of the evidence support a contrary finding. Noll v. Dimiceli's, Inc., 115 Wis. 2d 641, 643-44, 340 N.W. 2d 575 (Ct. App. 1983).

LEGAL ARGUMENT

A constructive trust can only be awarded to prevent unjust enrichment which arises when one party receives a benefit the retention of which would be unjust as against the other party. Sulzer v. Diedrich, 2003 WI 90, ¶ 20, 263 Wis. 2d 496, 664 N.W.2d 641. The ultimate decision whether to grant the equitable relief of a constructive trust is a discretionary one for the Court. This Court reviews the Circuit Court's discretionary action using the "erroneous use of discretion" standard. Sulzer, 2003 WI 90 ¶ 16.

In Sulzer, the Court set forth long established law that a constructive trust will be imposed only when the party holding legal title to the property received it 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, and that person, in

equity and good conscience, should not be entitled to beneficial enjoyment of it. Sulzer 2003 WI 90, at ¶20.

The Plaintiff's Complaint did not allege, and the Court's Decision did not find, that Juliette committed "actual or constructive fraud", "duress" or "mistake". Therefore, only alleged "abuse of a confidential relationship, commission of a wrong, or any form of unconscionable conduct." was at issue in this case.

Of course, if Orsoni made a gift of the Edward Jones account to Juliette, appropriately accepted by Juliette, then there could be no claim of abuse, wrongdoing or misconduct against Juliette. Below we will discuss why, as a matter of law, accepting the gift was not a violation of Juliette's fiduciary obligation under Praefke v. American Enterprise, 2002 WI App 235, 257 Wis. 2d 637 655 N.W. 2d 456. However, first we address the issue of whether there was a gift at all. Second, we will address whether the Edward Jones account was held in joint tenancy between Orsoni and Juliette with right of survivorship. Thirdly, we will address whether the gift was a violation of any duty by Juliette. Finally, we will discuss whether Orsoni's estate planning documents preclude Plaintiffs' claims.

I. The Circuit Court Erred In Finding That The Edward Jones Account Was Not Gifted to Juliette.

A. Orsoni Made A Gift Of The Account To Juliette.

The Circuit Court made a clearly erroneous and critical finding of fact that:

> There was no corroboration of Juliette Kangas's claim that the Edward Jones account was just given to her. (R-33, 1).

There was plenty of corroboration of the gift of the joint tenancy interest in the account, all of which was ignored in the Court's Decision.

First, it was undisputed that, in 1995, Orsoni voluntarily signed the Edward D. Jones form transferring the entire Edward Jones account to Juliette. (R-26, Exhibit 4, R-55, 179-180). Then, it is undisputed that, in 2005, Orsoni and Juliette voluntarily signed Exhibit 16, an Edward D. Jones form transferring the entire Edward Jones account into a joint account between the two of them. (R-26, Exhibit 16, R-55, 47). That was verified by the testimony of Edward D. Jones Investment Advisor, David Riegler. (R-55, 183-184). Therefore, not just once, but twice, Orsoni signed transfer forms at Edward D. Jones making Juliette an owner of the account. In 2005, when Juliette signed Exhibit 16, Juliette gave up her previous sole title to the account. (R-55, 47). Juliette testified that came about in 2005 when she was at Orsoni's home and happened to see an Edward Jones account Statement in Juliette's sole name. Juliette thought that was not right, so she and Orsoni went to Edward Jones to set up the joint tenancy between Orsoni and Juliette. (R-55, 47). Juliette's testimony was that the 2005 transfer was a gift by Orsoni, because whoever survived, would own the account 100%. (R-55, 48-

50). Juliette consistently took the position that the joint tenancy was a gift to her. (R-55, 63, 76, 173).

There were other facts and circumstances concerning the 2005 transfer, showing that it was a gift. Juliette was Jean Orsoni's niece-in-law, her closest relative, a very close friend, and the person who was always there to help Orsoni. (R-55, 29-33). Juliette was clearly the object of Jean Orsoni's financial bounty. (R-55, 53-56). All witnesses testified that, when Orsoni signed the Edward Jones joint tenancy document in 2005, she was mentally competent. (R-55, 37, 133). Juliette, Orsoni's Attorney, Paul Sturgul, and her investment advisor, Mr. Riegler, all testified that Juliette did not exert any influence upon Orsoni to transfer the account. (R-55, 37, 142, 184). Both Mr. Sturgul and Mr. Riegler testified that they knew of no suspicious circumstances in the transfer. (R-55, 142-143, 184).

Of equal importance, is the undisputed evidence that the Edward Jones account was never titled to the Trust. The Circuit Court Decision stated that:

> Paul Sturgul was a credible witness who testified that there's a two-step process that most attorneys follow, first, creating a trust and, second, transferring assets into it. (R-33, 1).

Attorney Sturgul was qualified as an expert in estate planning and elder law. (R55, 97). Mr. Sturgul testified to the two-step estate planning process mentioned above in the Court's Decision. (R-55, 113). Mr. Sturgul took the first step of creating the Trust. However, the Court then ignored the fact that neither Orsoni

nor Mr. Sturgul did anything on the second step to transfer the Edward Jones asset to the Trust, and the Edward Jones account was not mentioned anywhere in the Trust or Amended Trust. (R-26, Exhibits 6, 10, R-55, 169). The two-step process relied upon by the Court was never followed with regard to the Edward Jones account. Why wasn't the two-step process followed with regard to the Edward Jones account? We submit that it was because the overwhelming evidence showed that Orsoni's intentions were clear that the Edward Jones account was not to be governed by the Trust. Long established law is that a Court is obligated to uphold the intent of the settlor under a Trust. Weinberger v. Bowen, 2000 WI App 264, ¶12, 240 Wis. 2d 55, 622 N.W. 2d 471. The language of the document is the best evidence of intent. Siegler v. Webb, 2009 WI App 110, ¶17, 320 Wis. 2d 704, 771 N.W.2d 928. As a matter of law, the Circuit Court erred in construing the Trust to govern the Edward Jones account. Obviously, since the account was not governed by the Trust, it had to be governed by the joint tenancy agreement, Exhibit 16, because there simply was no other document governing that account.

Orsoni's intention to leave the account to Juliette through the joint tenancy was not an accident or a mistake by Orsoni. On March 21, 1995, Attorney Sturgul's associate, Brian Tarro, took Orsoni to Edward D. Jones to get the account put back into Orsoni's sole name. (R-55, 92-95). That never happened. (R-55, 92-95). Edward D. Jones never received any request to transfer the account back into Orsoni's name. (R-55, 188-189). We believe the Court missed the

significance of Brian Tarro's testimony, which actually supported Juliette. The significance is that, even though Mr. Sturgul may have recommended that the account be titled to Orsoni alone, and even took the step of having his employee take Orsoni to Edward D. Jones to do that, Orsoni presumably did not want to follow that recommendation, and did what she wanted to do. Over the years 1994 through 2006, Orsoni executed numerous other estate planning documents at Mr. Sturgul's office. The Trust was revocable, and Orsoni had multiple chances to have the Trust re-worded to govern the Edward Jones account by saying so in any one of those document. (R-55, 145). Mr. Sturgul testified, and Plaintiff's stipulated, that all those documents are unambiguous. (R-55, 169). Yet, none of those estate planning documents mentioned the Edward Jones account or any cash accounts. The Court should have found that is resounding evidence of Orsoni's intention to have the Edward Jones account governed by the joint tenancy agreement, Exhibit 16, rather than the Trust.

Apparently, the Circuit Court thought there an issue of gift law by holding that:

> No legal authority is cited to support the claim that Exhibit 16 by itself shows that Jean Orsoni clearly intended to create a joint account. (R-33, 1).

The transfer by Orsoni was clearly a gift to Juliette as defined by Wisconsin law. The elements of a gift are: (1) donor's intention to give; (2) actual or constructive delivery to the donee; (3) termination of the donor's dominion, and; (4) dominion

in the donee. Giese v. Reist, 91 Wis. 2d 209, 218, 281 N.W. 2d 86, 90 (1979). All of those elements were present with the gift of the joint tenancy interest. The first element, donative intent, is presumed if the form of ownership is a joint tenancy with the right of survivorship. Johnson v. Mielke, 49 Wis. 2d 60, 77, 181 N.W. 2d 503, 511-12 (1970); Baum-Riechman v. Riechman, 2008 WI App 172 ¶ 13 314 Wis. 2d 747, 760 N.W. 2d 183. The evidence on the character of the Edward Jones account as a joint tenancy with the right of survivorship will be shown below in this Brief. The presumption of a gift with a joint tenancy can only be rebutted by clear and satisfactory evidence. Estate of Kemmerer, 16 Wis. 2d 480, 488-489, 114 N.W. 2d 803 (1962); Estate of Roth, 25 Wis. 2d 528, 533, 131 N.W. 2d 286 (1964). In the present case there was no evidence to rebut the presumption of a gift.

Furthermore, the length of time that funds remain in a joint account, along with other evidence, is part of the inquiry into establishing the presumption of donative intent. Russ v. Russ, 2007 WI 83, 302 Wis. 2d 264, 281, 734 N.W. 2d 874. Here, the funds remained in the joint Edward Jones account for about five years, from 2005 until Orsoni's death in 2010.

The second, third and fourth elements of a gift, actual or constructive delivery to Juliette, termination of the Orsoni's dominion over the gift account, and Juliette's dominion over the account were shown by the undisputed evidence. The 2005 Exhibit 16 resulted in Edward D. Jones transferring the account into the

joint names of Orsoni and Juliette. (R-55, 183-184). The Edward Jones account Statements were sent to Juliette. (R-55, 50, 71). Juliette made withdrawals from the account. (R-55, 51). The Court should have found that there was overwhelming unrebutted evidence of a gift.

B. Orsoni Intended To Establish A Joint Tenancy In The Edward Jones Account.

The Circuit Court committed a clearly erroneous and critical error of law by holding that:

> No legal authority is cited to support the claim that Exhibit 16 *by itself* shows that Jean Orsoni clearly intended to create a joint account. (Emphasis added). (R-33, 1).

First of all, the question is not whether Exhibit 16, by itself, showed that Jean Orsoni intended to create a joint account. The question for the Court was whether all of the facts and circumstances showed that Jean Orsoni intended to create a joint account. Estate of Kohn, 43 Wis. 2d 520, 524, 168 N.W. 2d 812 (1969). The Circuit Court completely ignored the facts and circumstances showing that Orsoni intended to create a joint account.

First, the Court ignored the fact that Exhibit 16 stated in the upper right hand corner "Account Class Code: 02 JOINT". (R-26, Exhibit 16). Orsoni's Edward Jones Investment Advisor, David Riegler, testified that the designation "JOINT" meant it was a joint tenancy. (R-55, 183, 197). The 2005 Exhibit 16

resulted in Edward D. Jones transferring the account into the joint names of Orsoni and Juliette. (R-55, 183-184). That testimony stood unchallenged at trial. Furthermore, Orsoni's own Attorney Sturgul acknowledged that the account was held in joint tenancy. (R- 55, 165).

In Marchel v. Estate Of Marchel, 2013 WI App 100 the Court of Appeals set forth the common law on determining a joint tenancy:

> At common law four "unities" were necessary in order to create a joint tenancy — the unities of: (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 2013 WI App 100 at ¶10

The "four entities" were proven with the Edward Jones account in question. The account was set up at the same time, in 2005. The account was set up in a single conveyance, Exhibit 16. The account was established by the same persons, Orsoni and Juliette. Both Orsoni and Juliette possessed and used the account. Juliette's uncontroverted testimony was that, after the joint account was set up in 2005, both she and Orsoni made withdrawals from the account. (R-55, 51). In addition, Juliette's uncontroverted testimony was that, beginning in about 2007, Edward D. Jones began mailing the account Statements to Juliette. (R-55, 50, 71).

In addition to common law, as a matter of statutory law, the Edward Jones account created by Exhibit 16 was a joint account by definition under Section

705.02 Wis. Stats. Exhibit 16 might not have fit the technical requirements of that Statute. (R-26, Exhibit 16). However, under subsection (3) of 705.02 Wis. Stats.:

> (3) 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, or a marital relationship if the account is created after January 1, 1986, *in accordance with whatever competent evidence is available concerning the depositor's intent at the time the account was created*. (Emphasis added).

Therefore, even though Exhibit 16 did not strictly conform to the technical requirements of Section 705.02 Wis. Stats., nevertheless it did create a joint account, since Jean Orsoni's intentions are clear from Exhibit 16 and other evidence that a joint tenancy was set up.

C. The Joint Edward Jones Account Was With Right Of Survivorship.

The Circuit Court stated that:

> The question before the Court is, did Jean Orsoni intend that the Edward Jones account have a survivorship feature? (R-33, 1).

While the Court's Decision did not specifically find that the account did not have a survivorship feature, that finding appears to have been implied in the Court's Decision.

Of course, any account between two parties could be either a "joint tenancy" or a "tenancy in common". In Estate Of Mavrogenis, 74 Wis. 2d 162, 165, 246 N.W. 2d 147 (1976), the Supreme Court stated that the only relevant distinction between a tenancy in common and a joint tenancy, is the right of survivorship feature. In Estate Of Schaefer, 72 Wis. 2d 600, 610, 241 N.W. 2d 607 (1976), the Court stated that the principle of survivorship is inherent in a joint tenancy (as opposed to a tenancy in common). So, was the account between Orsoni and Juliette a "joint tenancy" with survivorship, or was it a "tenancy in common"? The fact that the transfer form Exhibit 16 signed by Orsoni and Juliette stated it was "JOINT", indicated that was a joint tenancy with right of survivorship, rather than a tenancy in common. (R-26, Exhibit 16). That is because the word "JOINT" was used in describing the account, and "joint' is not a word used to describe a "tenancy in common". Exhibit 16 did not use the word "COMMON", or any other wording to indicate that Orsoni's intent was to establish a tenancy in common. (R-26, Exhibit 16).

The survivorship feature of the Edward Jones was corroborated by other evidence. David Riegler, Orsoni's Financial Advisor at Edward D. Jones, testified that the account was in joint tenancy with right of survivorship. (R-55, 185).

Trial Exhibit 5 was the April 30, 2010 Edward Jones Account Statement, stating on the second page that the account was “with right of survivorship”. (R-26, Exhibit 5). Over the years from 2005 to 2007, Mr. Riegler testified that Jean Orsoni received monthly account Statements from Edward Jones, similar to Exhibit 5. (R-55, 186-187). He testified that each of those Statements showed to Orsoni that the joint tenancy was with right of survivorship with Juliette. (R-55, 197-198). Over those years, Mr. Riegler said that he went over the monthly account Statements with Orsoni on a regular basis. (R-55, 195) The Court’s conclusion of fact should have been that, on regular occasions over those two years, Orsoni presumably was informed by those Statements that the account was held jointly with Juliette with survivorship rights. The Court should have found that, after 2005 until her death on 2010, Orsoni knew that upon her death, the account would go to Juliette. Yet, over that same period of time, in spite of having her Attorney Sturgul prepare new estate planning documents, Orsoni did nothing to change the joint tenancy with right of survivorship. Given that evidence, the Court should have found that there is little doubt about Jean Orsoni's intention that the Edward Jones account was a joint survivorship account.

In addition, by statutory definition, the Edward Jones joint account carried with it the survivorship feature. Under Section 854.03 (2) (a) Wis. Stats. "'co-owners with right of survivorship’ includes joint tenants ....”. Section 705.04(1) Wis. Stats. provides as follows:

> 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*." (Emphasis added).

There was no evidence, much less clear and convincing evidence, that a joint tenancy with right of survivorship was not intended by Orsoni. In Bruckner v. Prairie Fed. Savings & Loan Asso., 81 Wis. 2d 215, 260 N.W. 2d 256 (1977), the Court dealt with a POD (payable on death) account, which is similar to a joint tenancy with right of survivorship. The Bruckner Court held that under Section 705.02(3),

> ... even where the statutory procedures and forms are not followed, a deposit to an account shall nonetheless be deemed to create . . . a . . . P.O.D. relationship . . . in accordance with whatever competent evidence is available concerning the depositor's intent. (Emphasis supplied.) Bruckner 81 Wis.2d at 222-223.

The Bruckner Court held that Section 705.02(3):

> ... makes explicit that no special forms or procedures are required to create a POD account. All that is needed is competent evidence of the account owner's intent to create the POD relationship. Bruckner, 81 Wis. 2d at 223.

The same should be true with joint accounts. Here, there was competent evidence of Orsoni's intent to create the joint tenancy with right of survivorship, as set forth

above. Therefore, no special form was required under 705.02(3) Wis. Stats. to establish a joint tenancy in the Edward Jones account.

D. Orsoni Did Not Establish The Joint Tenancy "For Convenience Only".

Orsoni's Attorney Paul Sturgul testified that he thought the Edward Jones joint tenancy was set up "for convenience only", and therefore he implied that the entire account was "really" owned solely by Jean Orsoni. (R-55, 114-115). No law supports the idea that what Mr. Sturgul thought or assumed or believed is relevant to the Court's determination of the intention of Jean Orsoni. The Court did not specifically find that the account was for convenience only. Perhaps, that was because there was no such "convenience only" indication in the Edward Jones account document, or any other document, signed by Orsoni or Juliette. (R-26, Exhibit 16, R-55, 60, 140, 162, 173, 186).

In Estate of Michaels, 26 Wis. 2d 382, 132 N.W. 2d 557 (1965), the Supreme Court dealt with the issue of whether a joint bank account was merely "for convenience only". The Michaels case involved a passbook savings account which was registered in the names of Helen Michaels or Harry Michaels. Immediately below the written names was stamped these words: "A joint and several account payable to either or the survivor." Michaels, 26 Wis 2d at 384. Harry Michaels was one of Helen's children who had helped Helen in her tavern

business for years. The County Court determined that it was not the intent of the depositor, Helen Michaels, to create a joint ownership in the bank account with a right of survivorship in Harry Michaels, because Harry Michaels' name had been included on the bank account passbook only for the convenience of Helen Michaels; and therefore the account was solely owned by her at the time of her death. Michaels, 26 Wis 2d at 384. That is the same argument made by the Plaintiffs in the case at bar. However, the Supreme Court in Michaels reversed the County Court, holding that the account was not merely for convenience only, but with survivorship rights to Harry. Michaels, 26 Wis. 2d at 389. The Supreme Court cited held that a rebuttable presumption exists that the donor depositor intended the right of survivorship, which presumption can only be rebutted by clear and satisfactory evidence. Michaels, 26 Wis. 2d at 390. The Court held that evidence showing a different intent, for instance that the joint names were adopted for convenience without the intent of conferring ownership, must be clear and satisfactory. Michaels, 26 Wis.2d at 390-391.

The Court in Michaels held that there was no direct evidence, certainly not clear and convincing evidence, that Harry was named as a joint codepositor merely for the convenience of Helen Michaels. Michaels, 26 Wis.2d at 392. The Supreme Court held that:

> Under the evidence here presented it is possible to surmise that she may have had Harry's name added as a joint payee so that if she did become incapacitated at some

> future time he would be able to make withdrawals for her benefit. It is equally tenable to assume that because Harry was then rendering assistance to her in the tavern and about the premises that she had his name added so that he would receive the account upon her death as a reward for his services. *Mere surmise and theorizing of possibilities falls far short of constituting the clear and convincing evidence* required as a condition for equity imposing a trust to defeat Harry's legal title to the account as the surviving copayee. (Emphasis added). Michaels, 26 Wis.2d at 393.

Similarly, in this case, it is possible to surmise that Jean Orsoni may have had Juliette's name added as a joint tenant only so that if she became incapacitated at some future time, Juliette would be able to make withdrawals for her benefit. It is equally tenable to assume that, because Juliette was a relative, her closest friend and rendered assistance to Orsoni for a long time, Orsoni had Juliette's name added so that Juliette would receive the account upon Orsoni's death as a reward for her services. As held by the Supreme Court in Michaels, supra, mere surmise and theorizing of possibilities falls far short of constituting the clear and convincing evidence that the joint Edward Jones account was "for convenience only". That should have been the holding of the Circuit Court in the present case.

Mr. Sturgul did not testify that, before Orsoni died, he told Juliette that the account was “for convenience only”. It was only after Orsoni died that Mr. Sturgul started claiming that the joint tenancy was for convenience only. (R-55, 59, 60). Mr. Sturgul testified that, at least by July of 2006, he knew that the Edward Jones account was titled in joint tenancy between Orsoni and Juliette. (R-

55, 165). In fact, Mr. Sturgul testified that holding the Edward Jones account as joint tenancy was a good estate planning technique. (R-55, 162). Then, in September of 2006, at a time that Mr. Sturgul knew of the joint tenancy, Orsoni went to Mr. Sturgul's office to sign new estate planning documents. (R-55, 12, 107). In 2006, if Mr. Sturgul really believed that Orsoni wanted the Edward Jones joint account to be "for convenience only", presumably he would have had Orsoni sign some document to express that intention. Yet, there was no document signed by Jean Orsoni stating that the Edward Jones account was "for convenience only". (R-55, 173). In fact, there was no evidence at all that the Edward Jones joint account was "for convenience only".

Plaintiffs did interject some circumstantial evidence and arguments attempting to show that Orsoni really did not intend a gift of the account to Juliette. It is difficult to tell from the Court's Decision, which, if any, of Plaintiffs' circumstantial evidence and arguments was accepted by the Court. However, none of Plaintiffs' evidence or arguments was probative. Plaintiffs' arguments were as follows:

1. The "Makes No Sense" Argument.

The Court found that:

> Juliette Kangas violated the wishes of Ms. Orsoni as regards to her trust. (R-33, 3).

That was the Court's finding in spite of the fact that there was no evidence that Orsoni wanted the Edward Jones account to be distributed according to the Trust. Perhaps the Court accepted what might be called Plaintiffs' "makes no sense" argument that the Edward Jones account should be governed by the Trust. (R-28, 15-16, R-55, 78, 149). Mr. Sturgul testified that if the Edward Jones account was not to be part of the Trust, then: "Why in the world would anybody draft a Trust if it didn't have assets in it." (R-55, 149). The Plaintiffs' argument goes that, if the Trust would have no assets, then it would "make no sense" for Orsoni to even have a Trust.

However, Plaintiffs' "makes no sense" argument fails for a number of reasons. First, the evidence showed that the Trust did, in fact, have title to other assets. The Trust had title to Orsoni's home for a period of time, a checking account, a vehicle and all of Orsoni's tangible personal property. (R-26, Exhibit 9, R-55, 153-154). Apparently, those were the only assets Orsoni wanted to be governed by the Trust. The Trust clearly stated that Orsoni was transferring only "certain" of her assets to the Trust, indicating an intention not to put all of her assets in the Trust. (R-26, Exhibit 6, second paragraph).

Secondly, it was Juliette's testimony that at least Juliette questioned the need for Orsoni to have the Trust at all. (R-55, 79). Attorney Sturgul may have seen a need for the Trust, but perhaps Jean Orsoni did not. Perhaps, Mr. Sturgul advised Orsoni to put the account in the Trust, but clients don't always follow

their Attorney's advice. The evidence was clear that Orsoni was a savvy investor who knew how she wanted her investments handled. (R-55, 35). Whatever the reason, after Orsoni died, the Circuit Court was left with deciding the Orsoni's intention based only upon the written documents signed by Orsoni. There is no written document indicating that Orsoni wanted the Trust to govern the Edward Jones account. For all of those reasons, the "makes no sense" argument should have been rejected by the Court. Since the Court did not mention that argument in its Decision, apparently the Court did reject that argument.

2. The Gifts After Jean's Death Argument.

The Court held that:

> ... Juliette Kangas followed to a large extent the wishes of Ms. Orsoni but reserved a right to veto distributions with which she disagreed. (R-33, 2-3)

First of all, Juliette never said outside the Courtroom, nor did she testify, that she had the right to veto Orsoni's wished. Just the opposite, Juliette testified that her goal was to follow Orsoni's wishes. (R-55, 10).

However, the Court apparently was referring to the fact that, after Orsoni died, Juliette made several transfers of some of the Edward Jones money to the same people who were beneficiaries under the Trust. (R-55, 17, 64-65). Apparently, the Court was referring to Juliette's testimony in response to Plaintiffs' Attorney's questions as follows:

> Q. So, you felt that you had such a special relationship with Jean Orsoni and had helped her throughout her life that it was *really up to you to decide* what parts of the Amended trust or the original Trust should be followed *in distributing the Edward Jones account*.
>
> A. Yes. yes, I did. (R-55, 14). (Emphasis added).

When Juliette testified that it was up to her to decide what parts of the Amended or original Trust should be followed, she was only referring to the distribution of the Edward Jones account. Juliette testified that, since the Edward Jones account belonged to her, she had the right to distribute the Edward Jones money according to the Trust – or not to follow the percentages under the Trust. (R-55, 64-65). Juliette testified that, following Orsoni's wishes, she felt no obligation to distribute the Edward Jones account according to the Trust. (R-55, 14, 15, 65). She testified that the transfers she made after Orsoni's death were gifts to those persons and the Plaintiff Church. (R-55, 17, 64-65). She was right. If, as we have shown, the Edward Jones account belonged entirely to Juliette, those transfers were gifts by her of money that belonged to her alone. (R-55, 17, 64-65). In fact, the amounts of Juliette's gifts were substantially different than what the distributions would have been if the Trust had owned the Edward Jones account. That showed that Juliette did not believe the Trust governed the Edward Jones account. Otherwise, she would have distributed the money according to the strict percentage under the Trust.

3. The Trustee's Fee Argument.

The Court also held 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. (R-33, 2).

Exhibit 18 was a "accounting" handwritten by Juliette before her deposition in this matter. (R-26, Exhibit 18, R-55, 26). Juliette testified that Exhibit 18 was prepared by her only because she was request to do so, to show how the Edward Jones account would have been distributed if it was distributed under the terms of the Trust, including showing a trustee's fee. (R-55, 26-28). She was merely following directions. (R-55, 28). Juliette neither said before the trial, nor testified at the trial, that she ever requested a trustee fee. Thus, Exhibit 18 was no evidence that Juliette regarded the Edward Jones account to be governed by the Trust. From before Jean's death, and through the trial of this matter, the evidence showed that Juliette's position was always consistent that the account was not to be treated as part of the Trust property. (R-55, 14, 59, 173).

II. The Court Erred In Holding That Juliette Breached Her Fiduciary Duty To, Or Confidential Relationship With, Orsoni.

The Circuit Court's Decision impliedly held that, in accepting the gift, Juliette violated her fiduciary duty as agent, or as Trustee, or her confidential relationship with Orsoni. The Circuit Court held that:

> Based upon these findings, the Court is of the opinion that Ms. Kangas erred in comingling her interest with Jean's by participating in the joint retitling and putting herself in a position where she could frustrate Jean Orsoni' estate planning. (R-33, 2).

The Court further held that:

> ... Juliette Kangas followed to a large extent the wishes of Ms. Orsoni but reserved a right to veto distributions with which she disagreed. This is a clear breach of the duty of loyalty ... (R-33, 2-3).

A. Juliette Did Not Breach Her Duty As Agent Under The Power Of Attorney.

The Court's Decision was not explicit as to whether the Court believed that Juliette breached her duty of loyalty as agent under the Power of Attorney, or as Successor Trustee under the Trust. As will be shown below, there was no evidence or law to back up a finding that Juliette breached any duty to Orsoni or the Plaintiffs under the Power of Attorney or the Trust.

First of all, the evidence at trial was clear that Juliette did not, on her own, just take the Edward Jones account from Orsoni, unbeknownst to Orsoni. Rather, the evidence showed that Jean Orsoni, while mentally competent, without any influence, much less undue influence, and without any suspicious circumstances, voluntarily gifted the Edward Jones account into joint tenancy with Juliette. (R55, 133).

Yet, the Court may have believed that Juliette breached her fiduciary obligation under the Power of Attorney by failing to distribute the Edward Jones account in accordance with the Trust. The only possible way the Court could make that finding would be to first find that Juliette breached her duty as agent under the Power of Attorney, by accepting the gift of the account in the first place. However, such a finding would fail under established Wisconsin case law. Praefke v. American Enterprise, 2002 WI App 235, 257 Wis. 2d 637 655 N.W. 2d 456. In the Praefke case, Praefke was attorney-in-fact for Glasslein under a durable power of attorney. Approximately one year after Glasslein executed the power of attorney, she was diagnosed with Alzheimer's. Following that diagnosis, Praefke as attorney-in-fact, on her own, changed the payable on death beneficiary designations on most of Glasslein's assets, to herself. The power of attorney did not contain specific language stating that the agent may make gifts to herself or had any gifting powers. Praefke 257 Wis. 2d at 643. The Praefke Court established a bright-line rule that an attorney-in-fact under a power of attorney may not make a gift to herself unless there is an explicit intent in writing in the power of attorney from the principal allowing the gift. Praefke 257 Wis. 2d at 646.

More recently, in the very case cited by the Circuit Court in its Decision, Russ v. Russ, 2007 WI 83, ¶ 28, 302 Wis. 2d 264, 734 N.W. 2d 874, the Praefke rule was again upheld by the Supreme Court:

> ¶ 28. We agree with Johnnie that a POA agent has a fiduciary duty to the principal, and that the agent is usually prohibited from self-dealing *unless the power to self-deal is written in the POA document*. *Praefke*, 257 Wis. 2d 637, ¶ 16; *Alexopoulos*, 48 Wis. 2d at 41. (Emphasis added).

Thus, acceptance of a gift by an agent under a power of attorney is not necessarily a breach of fiduciary obligation. It is only a breach if the gift was not authorized under the power of attorney itself. In the case at bar, the relevant Power of Attorney was the 1994 Power, since that was the one in effect in 1994, at the time the Edward Jones account was transferred to Juliette's sole name, and also in 2005 when the joint tenancy was set up. (R-26, Exhibit 2). In the 1994 Power of Attorney, gifting powers were granted by Orsoni to Juliette as follows:

> 21. Make gifts of any kind, including gifts to my agent, in accordance with my testamentary plan and *to make gifts of any kind, including gifts to my agent, in accordance with my pattern of gift giving*. (Emphasis added). (R-26, Exhibit 2, R-55, 53). [2]

So, unlike the power of attorney in the Praefke case, the 1994 (and 2006) Orsoni Power allowed Juliette to accept a gift from Orsoni, or make gifts to herself, if the gift was made in accordance with Orsoni's pattern of gift giving. The evidence at trial was overwhelming and undisputed that Orsoni's pattern of gift giving was only to Juliette and Juliette's children. (R-55, 53-56). Orsoni's pattern of gift giving did not include the Plaintiffs, or anyone else other than Juliette and her

[2] Orsoni's 2006 Power of Attorney also contained the same gifting powers. (R-26, Exhibit 13).

children. (R-55, 53-56). Also, unlike the agent in the Praefke case, Juliette did not just take the account unbeknownst to Orsoni. Therefore, as a matter of law under Praefke and Russ, supra, there was no breach of fiduciary obligation when Juliette accepted the voluntary gift to her of the Edward Jones account by Jean Orsoni.

However, the Circuit Court also held that:

> Russ Schwartz versus Russ, 2007 WI 83, 734 N.W. 2d 874 (2007), provides guidance for the Court in determining conflicting presumptions that creation of a joint account raises a presumption of a gift, but creating one with a fiduciary raises a presumption of fraud, therefore, two conflicting and inconsistent presumptions co-exist. (R-33, 1-2).

While the Circuit Court did not specifically hold that a presumption of fraud existed, rather than a presumption of a gift, that was the implication in the Decision. If that was the holding, the Circuit Court ignored the law under the Praefke and Russ, supra, cases. That is, there is no presumption of fraud here, because the gift was appropriate under the Praefke and Russ holdings. There is no conflict of presumptions at all, because the Power of Attorney authorized the gift under the Praefke and Russ holdings. Therefore, the presumption of a gift stands in this case.

In addition, Juliette voluntarily signed a document at Edward D. Jones voluntarily transferring her sole titled in the account, to joint tenancy, thereby

giving up sole title, and making Orsoni a joint tenancy owner. (R-55, 47). That benefitted Orsoni because if Juliette had passed away first, Orsoni would have been sole owner. In short, Juliette was benefitting Orsoni and looking out for Jean Orsoni's interest. No claim of a breach of fiduciary obligation could be made over an action that benefitted Jean Orsoni.

B. Juliette Did Not Breach Her Duty As Successor Trustee.

Mr. Sturgul testified that Juliette did not act as Successor Trustee until after Jean Orsoni's death. (R-55, 145, 164-165). Juliette complied with her duty by following the Trust. (R-55, 62). Other than her disagreement with Mr. Sturgul that the Edward Jones account was governed by the Trust, Mr. Sturgul admitted that Juliette did not breach her duty as Successor Trustee. (R-55, 62). Any claim of breach of a fiduciary duty by Juliette after Orsoni's death, acting as Successor Trustee, is no better than the claim before Orsoni's death, under the Power of Attorney. Generally the tasks that the trustee is agreeing to undertake are set out in a trust agreement. "[T]he instrument creating the trust. . . is to be looked to for stipulations fixing the obligations of the parties ... A trustee must comply with the terms of the trust under which he agrees to perform certain tasks." (Citations omitted). Zastrow v. Journal Communications, Inc., 2006 WI 72, ¶ 33, 291 Wis. 2d 426, 718 N.W. 2d 51. Juliette's only duty was to strictly comply with the wording in the Trust. It is undisputed that the Edward Jones account was never titled to the Trust, and that the Edward Jones account was not mentioned anywhere

in the Trust or Amended Trust. The Trustee of the Jean Orsoni Trust, whether that was Orsoni herself or Juliette, did not have a duty to transfer the Edward Jones account to the Trust or to distribute that account according to the Trust. So, where was there any Trustee duty on the part of Juliette to distribute the Edward Jones account in accordance with the terms of the Trust? There was no such duty. Courts in the exercise of equity powers may not enlarge, modify or defeat the terms of the trust, Scott v. Quarles, 197 Wis. 327, 330, 222 N.W. 2d 235, 237 (1928). The Court in Estate of Boyle, 232 Wis. 631, 637, 288 N.W. 257 (1939), said: "The court must exercise its power to prevent enlargement or modifying the terms of the trusts ..." Therefore, the Circuit Court did not have the authority to modify the terms of the Trust, to find that the Trust governed the Edward Jones account, in order to hold that Juliette should have transferred the account according to the Trust.

III. The Court Erred In Failing To Hold That The Trust Itself Precluded Plaintiffs' Claims.

In addition, under paragraph F, the Trust provided that:

> 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 the Trustee or to see to the application of any money paid or property transferred to or upon the order of such Trustee. (Emphasis added). (R-26, Exhibit 6).

Obviously, under the above provision, 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 Orsoni or Juliette. Yet, that is exactly what the Plaintiffs and the Court did in this case. During and after the Trial, Juliette contended that Plaintiffs were precluded from their claims under the above Trust provision. (R26, Exhibit 6; R-29, 13). The Court erroneously ignored Orsoni's wishes in failing to hold that Plaintiffs are precluded from their claims.

IV. The Court Erred In Failing To Hold That Juliette Was Released From Liability To The Plaintiffs Under The Power of Attorney.

In addition, the Court ignored the following provision in the 1994 Power of Attorney, in which Orsoni provided that:

> **XIV. NO LIABILITY OF AGENT**
>
> No Agent named or substitute 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*. (Emphasis added). (R-26, Exhibit 2). [3]

[3] This provision is valid under Section 244.15 Wis. Stats:

244.15 Exoneration of agent.

A provision in a power of attorney relieving an agent of liability for breach of duty is binding on the principal and the principal's successors in interest except to the extent that the provision does any of the following:

(1) Relieves the agent of liability for breach of duty committed dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal.

(2) Was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.

Thus, Juliette was released from liability to the Plaintiffs, unless Plaintiffs could fashion some claim of misconduct or negligence on the part of Juliette. The Court could not find that Juliette was guilty of any misconduct or negligence when, in 2005, Juliette voluntarily transferred the Edward Jones account into the joint names of Orsoni and Juliette, thereby giving up sole title. After all, Orsoni herself joined in doing that, and that benefitted Orsoni.

The Court must have believed that Juliette was guilty of misconduct or negligence, after Jean Orsoni's death, when Juliette refused the Plaintiffs' demands that the joint account be distributed to them under the terms of the Trust. However, the Edward Jones account was never titled to the Trust, and under the unambiguous terms of the Trust, the Edward Jones account was not to be governed by the Trust. The argument that Juliette was guilty of misconduct or negligence, after Jean Orsoni's death, should have been rejected by the Court.

Before, during and after the trial, Juliette maintained to the Court that Orsoni released Juliette from liability to the Plaintiffs concerning the action of transferring the account to Juliette under the above provision signed by Orsoni. (R-26, Exhibit 2; R-22, 8; R-29, 13). The Court failed to address the release issue. The Court should not have found liability to the Plaintiffs based upon an action that was released by Jean Orsoni.

V. The Court Erred In Failing To Hold That Orsoni Ratified Juliette's Actions Under The Power Of Attorney.

On December 16, 2006, after the gift of the account occurred, Orsoni signed another Jean B. Orsoni General Durable Power of Attorney, again naming Juliette as her attorney-in-fact. (R-26, Exhibit 13). Under that 2006 Power, Juliette was again granted the same authority by Orsoni to make gifts to herself. (R-26, Exhibit 13). In addition, the 2006 Power is material and relevant because in it, Jean Orsoni stated:

> **XI. RATIFICATION**
>
> 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... 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 have been done before or after my death. . . (Emphasis added). (R-26, Exhibit 13).

Under the above provision, Jean Orsoni effectively declared that the Edward Jones transfer shall be binding on "my heirs", including the Plaintiffs. As a matter of law, Orsoni ratified the Edward Jones transfer. Before, during and after the trial, Juliette maintained to the Court that Orsoni ratified the action of transferring the account to Juliette under the above provision signed by Orsoni. (R-26, Exhibit 13; R-22, 9; R-29, 14-15). The Court failed to address the ratification issue. The

Court should not have rejected a transfer based upon an action that was ratified by Jean Orsoni.

CONCLUSION

The conclusion is clear. Orsoni made a gift of the Edward Jones account to Juliette. Juliette was not unjustly enriched, and was not guilty of any "abuse of a confidential relationship, commission of a wrong, or any form of unconscionable conduct". The Court should have declined to impose a constructive trust, and should not have held that the Edward Jones account should be distributed according to the Trust. The Circuit Court's Decision, Order and Judgment should be reversed.

Dated this 9th day of December, 2013.

REPECTFULLY SUBMITTED:

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CERTIFICATION

I hereby certify that this Appellants' Brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief produced with proportional serif font (Times New Roman): 10 characters per inch (13 point for body text and 11 point for quotes and footnotes); double spaced; 1.5 inch margins on the left and 1 inch margins on the other 3 sides. The length of this Brief is 10,833 words.

Dated this 9th day of December, 2013

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CERTIFICATION OF MAILING

I certify that this Appellant's Brief and Appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on December 10th , 2013. I further certify that this Appellant's Brief and Appendix was correctly addressed and postage was pre-paid.

Dated this 10th day of December, 2013

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APPELLANTS' BRIEF APPENDIX CERTIFICATION

I hereby certify that filed with this Appellants' Brief, either as a separate document or as a part of this Brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the filings or opinions of the Circuit Court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the Circuit Court's reasoning regarding the issues.

I further certify that if this appeal is taken from a Circuit Court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and the final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of the full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 9th day of December, 2013

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that:

I have submitted an electronic copy of this Appellants' Brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

The electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 9th day of December 2013

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19

(13) I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of s. 809.19(13). I further certify that:

The electronic appendix is identical in content and format to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 9th day of December 2013

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