STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

In the marriage of:

Joan C. Pulkkila,
Petitioner-Appellant,

V.

James M. Pulkilla,
Respondent,

Lynnea Landsee-Pulkkila,
Other Party-Respondent.

Appeal No. 2018AP712-FT

Circuit Court Case No. 08-FA-000696

BRIEF OF OTHER PARTY-RESPONDENT LYNNEA LANDSEE-PULKKILA

On Appeal from a decision by the Honorable Paul Bugenhagen of
Waukesha County Circuit Court,
Case No. 2008FA000696

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COUNTER-STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. Did the circuit court lawfully exercise its discretion in finding that the equities weighed against imposing a constructive trust in this case?

Answer below: Yes

SUPPLEMENTAL STATEMENT OF FACTS

This section does not contest anything in Appellant's Statement of Facts, but provides additional relevant information for the Court's consideration.

Joan and James's marital settlement agreement ("MSA") included a detailed provision titled "Life Insurance" in Article V:

> "A. Both parties shall maintain in full force and pay the premiums on all life insurance presently in existence on their lives or obtain comparable insurance coverage, with the parties' minor children named as sole and irrevocable primary beneficiaries until the youngest minor child reaches the age of majority, or until the child has reached the age of 19 so long as the child is pursuing an accredited course of instruction leading to the acquisition of a high school diploma or its equivalent. During the term of such obligation, each of the parties shall furnish the other with copies of such policies or evidence of there being such insurance in force and proof of beneficiary designation upon request.
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> B. Each of the parties shall not borrow against any such policy or use any such policy as collateral or impair its value in any manner without the express written consent of the other or order of the court.
>
> C. This obligation may be satisfied by provisions in a will or trust.
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> D. If either party fails for any reason to maintain any of the insurance required under this article, there shall be a valid and provable lien against his or her estate in favor of the specified

beneficiary to the extent of the difference between the insurance required and the actual death benefits received." (R.38; App'x 15).

As a result of James' death, Joan received approximately $60,000 in life insurance proceeds and Social Security survivor's benefits totaling over $36,666. *See* Oct. 20, 2017 Hr'g Tr. at 8:7-10 (R.254; App'x 36); *see also* R.222 and R.239. The children received proceeds from a wrongful death settlement in the approximate amount of $45,000. *See* Oct. 20, 2017 Hr'g Tr. at 11:3-6 (R.254; App'x 39); *see also* R.239.

STANDARD OF REVIEW

This Court reviews the circuit court's decision not to impose a constructive trust under a discretionary standard. *Sulzer v. Diedrich*, 2003 WI 90, ¶16, 263 Wis. 2d 496, 664 N.W.2d 641. Because the circuit court's decision "sounds in equity," this Court will not reverse the decision absent "abuse of discretion." *Duhame v. Duhame*, 154 Wis. 2d 258, 260, 453 N.W.2d 149 (Ct. App. 1989). Within its lawful discretion, a circuit court may "reach a conclusion which another judge or another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning." *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). In reviewing the facts, "this Court construes the parties' marital settlement agreement *de novo*." *Sulzer*, 2003 WI 90, ¶16.

ARGUMENT

I. The circuit court properly exercised its discretion in declining to impose a constructive trust.

The circuit court did not abuse its discretion. Article V of the marital settlement agreement is clear and thorough. It documents that both Joan and James agreed to maintain life insurance policies naming their minor daughters as beneficiaries. MSA §V.A (R.38; App'x 14). They further agreed that both parties had the absolute right to monitor the other's compliance by requesting policy and beneficiary information at any time. *Id.* And they agreed that, in the event that either party "fails for any reason to maintain" life insurance, the remedy would be "a valid and provable lien against [the decedent's] estate in favor of the specified beneficiary." MSA §V.D (R.38; App'x 15).

The circuit court found Article V a clear and complete expression of Joan and James's intent, noting that they "anticipated one side or the other not following the agreement [with respect to life insurance] and set provisions for it." Oct. 20, 2017 Hr'g Tr. at 44:16-18 (R.254; App'x 72). For that reason, the circuit court declined to override the MSA and impose a constructive trust: "I'm not going to step outside of their agreement to provide for other remedies. … The parties voluntarily entered into the agreement at the time of the divorce and the Court is going to uphold their agreement." *Id.* at 45:13-20 (App'x 73). Judge Bugenhagen explained that "the Court's job isn't to go back and fix the parties' agreement." *Id.*

at 44:24-25 (App'x 72). This rings especially true when, as here, the agreement is complete and unambiguous.

Joan understandably is unhappy about how events unfolded.[1] But her unhappiness does not mean the circuit court abused its discretion. To the contrary, as in *Duhame*, "[t]he trial court's decision represents a correct application of the law based on the facts of record." 154 Wis. 2d at 268.

A. There is no basis for imposing a constructive trust.

Under Wisconsin law, a constructive trust "will be imposed only in limited circumstances." *Sulzer*, 2003 WI 90, ¶20 (quoting *Wilharms v. Wilharms*, 93 Wis. 2d 671, 678-79, 287 N.W.2d 779 (1980)). Constructive trusts allow courts to ameliorate unjust enrichment resulting from unconscionable conduct. *Id.* Where events lead to an outcome that "would thwart the intent of the parties and would be unjust," a constructive trust may be appropriate. *Id.*, ¶22. However, "unjust enrichment alone is not sufficient to warrant imposing a constructive trust." *Id.*, ¶20.

Neither unjust enrichment nor unconscionable conduct—both required elements—is present here, which is why the circuit court declined to impose this "drastic remedy of [] a constructive trust" Oct. 20, 2017 Hr'g Tr. at 15:1 (R.254; App'x 43). Nor would a constructive trust be equitable in these circumstances.

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[1] The circuit court reserved ruling on whether or not Joan was the proper party to bring this action. "The Court may or may not take up the issue of whether or not we have the proper parties to this, that is the question I'm not reaching today. … The court is not making any rulings on it." (R.254; App'x 75).

First, there is no unjust enrichment when the parties' agreement contemplated and provided for the exact circumstances at issue. Joan and James anticipated that one of them might not comply with their life insurance obligations; they negotiated and expressly included a remedial provision (§V.D) to deal with that possibility.[2] The circuit court has discretion not to impose a constructive trust when the parties already agreed to a remedy.[3]

The *Sulzer* decision is instructive on this point. There, the parties agreed to split equally husband's accounts with the Wisconsin Retirement System upon their divorce, but "then existing law did not permit … such an assignment." 2003 WI 90, ¶25. When husband died, his former spouse sought a constructive trust reflecting her partial interest in the retirement accounts. *Id.*, ¶12. In affirming the entry of the constructive trust, the Supreme Court explained that, had the couple agreed to a division they knew "was not legally permissible," the divorce agreement would not be able to "serve as grounds for imposing a constructive trust." *Id.*, ¶29. That is, the

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[2] Joan's counsel characterized the MSA provisions as "[f]reely bargained for by the parties fighting tooth and nail in the divorce." Oct. 20, 2017 Hr'g Tr. at 25:3-4 (R.254; App'x 53). Judge Bugenhagen concurred, noting that Article V "is what the parties bargained for." *Id.* at 45:11 (App'x 73).

[3] Joan's counsel argued below that the remedy in §V.D "isn't the only remedy" because the MSA "doesn't say there can't be other breaches or other remedies." Oct. 20, 2017 Hr'g Tr. at 21:20-25 (R.254; App'x 49). This echoes the argument in *Duhame* that, notwithstanding the parties' divorce stipulation that the husband would name the children as his life insurance beneficiaries, he was not obligated to make them "the *exclusive* beneficiaries under the policy." 154 Wis. 2d at 264 (emphasis in original). This Court dismissed that argument as inconsistent with "what the parties intended by the language used in the stipulation." *Id.* So, too, here, where Joan and James's intent is clear.

Court recognized "no dispute as the intent of the parties" and approved use of "a constructive trust to accomplish their intent." *Id.*, ¶28.

Here, Joan and James's intent is equally clear. They recognized the possibility that one of them would not abide by §V.A's life insurance requirement, and they crafted a remedy to apply in such a situation. Joan now dislikes the remedy she negotiated, but the outcome here accords with her and James's agreement; unlike in *Sulzer*, the outcome is not contrary to the divorce decree and there is no basis in the divorce agreement to impose a constructive trust.

Joan's assertion that Lynnea's receipt of some of James's insurance proceeds constitutes "the very definition of unjust enrichment under *Richards*" (Joan Br. at 14) is unsupportable.[4] Under Wisconsin law, "[t]he doctrine of unjust enrichment does not apply where the parties have entered into a contract." *Greenlee v. Rainbow Auction/Realty Co.* 202 Wis. 2d 653, 671, 553 N.W.2d 257 (Ct. App. 1996). Further, the equitable doctrine of unjust enrichment applies only in the absence of a remedy at law. *Plumbers' Woodwork Co. v. Merchants' Credit & Adjustment Bureau*, 199 Wis. 466, 471, 226 N.W. 303 (1929) (quoting *First Nat'l Exch. Bank v. Harvey*, 176 Wis. 64, 69, 185 N.W. 215 (1922)) ("It is a general principle of equity that it will not interfere to afford relief where legal redress is available.").

[4] It is notable (though not apparent from Joan's brief) that Joan and the children received financial benefits as a result of James's death. Joan and the children received a $62,000 life insurance payout, approximately $45,000 from a wrongful death action (brought by Lynnea), and monthly social security survivor's benefits. (*See* R.222, R.239).

Section V.D of Joan and James's MSA renders the precedents Joan cites uniformly distinguishable. *See* Oct. 20, 2017 Hr'g Tr. at 26:23-27:6 (R.254; App'x 54-55) ("But what is unique about the case before you is this provision of a remedy is a fairly new innovation. A lot of the old cases required a party to provide the life insurance and left it at that. It didn't tell the court what to do if a party didn't and here we have that now. And it's very explicit, it says that person, the aggrieved beneficiary, in this case would be the children, can make a claim against the decedent's estate."). In *Richards v. Richards*, 58 Wis. 2d 290, 206 N.W.2d 134 (1973), as in the other cases Joan relies upon, the parties made no provision for what would happen if a party failed to abide by the insurance obligations imposed as part of their divorce. That is why the courts in those cases imposed constructive trusts, and §V.D is the basis on which the circuit court denied Joan's request for a constructive trust. *See* Oct. 20, 2017 Hr'g Tr. at 44:3-45:20 (App'x 72-73). Moreover, Joan and James, unlike the parties in *Richards*, *Sulzer*, *Duhame*, and *Singer v. Jones*, 173 Wis. 2d 191, 496 N.W.2d 156 (Ct. App. 1992), foresaw the possibility of conflict and negotiated a legal remedy in advance. The existence of that agreed-upon remedy that precludes a finding of unjust enrichment—and thus precludes the imposition of a constructive trust.

Second, even if unjust enrichment occurred (and it did not), none of Joan, James, and Lynnea engaged in conduct that would bring this case within the "limited circumstances" that can be remedied by a constructive trust. *Sulzer*, 2003 WI 90, ¶20 (quoting *Wilharms*, 93 Wis. 2d at 678-79). Joan characterizes James's

designation of Lynnea as beneficiary on some of his life insurance policies as "unconscionable," "wrongful," and "contemptuous." (Joan Br. at 15-16.) But overheated rhetoric aside, there is no basis for lumping this designation in with the various "form[s] of unconscionable conduct" that Wisconsin law has recognized as giving rise to a constructive trust. *Sulzer*, 2003 WI 90, ¶20 (quoting *Wilharms*, 93 Wis. 2d at 678-79). Though Joan now paints James's conduct as beyond the pale, she and James expressly anticipated this possibility and negotiated the remedy in §V.D. That fact is incompatible with Joan's present position.

Finally, the circuit court recognized the fundamental inequity in imposing a constructive trust that renders a negotiated and agreed-upon remedial provision valueless. Judge Bugenhagen detailed his reasoning:

> [T]he parties set forth the language in their marital settlement agreement, as to what would happen if part A wasn't complied with. They could go to C or D. D, obviously is a lot less attractive to the children, *but it doesn't mean that D is valueless* or that the Court needs to step in and create a new remedy for this, in essence, the constructive trust. To do so would … in essence require this Court to go back and rewrite what the parties felt was fair. The parties anticipated one side or the other not following the agreement and set provisions for it. … Obviously this Court knows from what it's been told that remedy is not at all the same as what would have occurred if A had resulted.
>
> But the Court's job isn't to go back and fix the parties' agreement to make it fair now …. I'm not going to step outside of their agreement to provide for other remedies. … The parties voluntarily entered into the agreement at the time of the divorce and the Court is going to uphold their agreement.

Oct. 20, 2017 Hr'g Tr. at 44:4-45:20 (R.254; App'x 72-73) (emphasis added). Courts avoid interpreting agreements in ways that render provisions valueless. *See,*

e.g., *Duhame*, 154 Wis. 2d at 264-65 (citing *Estate of Boyd*, 18 Wis. 2d 379, 381, 118 N.W.2d (1963)).

In balancing the equities here, the circuit court recognized that imposing a constructive trust would render §V.D. valueless. Judge Bugenhagen explained that granting the constructive trust Joan requested would "require court after court to examine these matters after a party's death to see if [] this worked out as fair as they wanted it to." Oct. 20, 2017 Hr'g Tr. at 44:11-14 (R.254; App'x 72). He continued: "the parties had already made their provisions on [this topic], that [§V.D] was the next step that they would go to and it's not as good of an answer, but … that is what the parties bargained for." *Id.* at 45:7-11 (App'x 73). The circuit court accepted Article V as negotiated between Joan and James, holding that it would be inequitable to impose, *post hoc*, additional remedies not bargained for simply because the MSA did not work out as Joan desired. *See, e.g.*, *Northern Crossarm Co., Inc. v. Chem. Specialties, Inc.*, 318 F. Supp. 2d 752, 767 (W.D. Wis. 2004) ("Unjust enrichment is not a mechanism for correcting soured contractual arrangements.").

In considering the equities, there is one more fact worthy of consideration. The parties negotiated language at the end of Section V.A, which (though omitted from Joan's brief) authorized either party to request at any time evidence that life insurance policies remained in force carried appropriate beneficiary designations. (R.38; App'x 14). During what Joan's counsel characterized as the "long and litigious history in their divorce before the MSA and after the MSA," Oct. 20, 2017

at 12:21-23 (R.254; App'x 40), Joan never filed for contempt or to compel James to provide proof of the beneficiary designations or whether the policies were in even in force. *Id.* at 35:11-17 (App'x 63). By her inaction, Joan relied on §V.D to provide a remedy if needed. Now that the remedy is less effective than she desires, she wants a court to undo her prior decisions. The circuit court refused, and this Court should affirm.

B. Appellant's procedural argument about ambiguity is a red herring.

Joan argues that the circuit court erred by looking for ambiguity in the MSA before imposing a constructive trust. (Joan Br. at 7). No one is maintaining—here or below—that ambiguity is a prerequisite to a constructive trust. And the circuit court never made such a holding. Judge Bugenhagen considered the lack of ambiguity in Article V of the MSA a significant factor in determining that the equities weighed against imposing a constructive trust. But, as explained above, the circuit court's analysis was guided by applicable law and its ultimate decision was not an abuse of discretion.

The *Duhame* decision—described by Joan's counsel as "a very similar case, largely on all fours," Oct. 20, 2017 Hr'g Tr. at 12:9 (R.254; App'x 40)—resolves this issue. The circuit court there proceeded similarly to the circuit court here. It heard argument from both sides over how to interpret the divorce stipulation and then weighed the equities in deciding to impose a constructive trust. In *Duhame*, because the stipulation was ambiguous, the court looked to the parties' intent as determinative of the equities. 154 Wis. 2d at 266-68. Here, the circuit court found

that the MSA unambiguous and therefore did not need further evidence to determine the parties' intent. (R.251; App'x 78). In both cases, the circuit court acted to effectuate the parties' intent. In *Duhame*, that meant imposing a constructive trust to remedy the ambiguity in the parties' agreement; here, it mean declining to impose a constructive trust and allowing the parties' agreement to control.

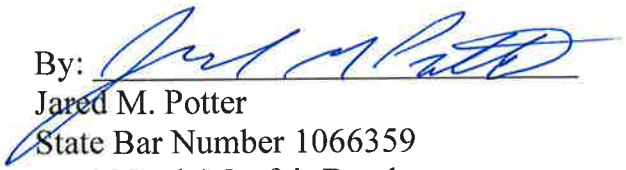
In *Duhame*, this Court affirmed that the circuit court's intent-based determination was "a correct application of the law" and a proper exercise of discretion. 154 Wis. 2d at 268. Here, as well, the circuit court used the parties' intent as its touchstone. The issue is not ambiguity, as Joan would have this Court believe—but the equitable effort to enforce the agreement that the parties negotiated. The circuit court committed neither a procedural error nor an abuse of discretion in making every effort to assure that the remedy reflected the parties' meeting of the minds.

CONCLUSION

The trial court did not abuse its discretion in declining to impose a constructive trust. The ruling below should be affirmed.

Dated: July 3, 2018

STAFFORD ROSENBAUM LLP

By: 

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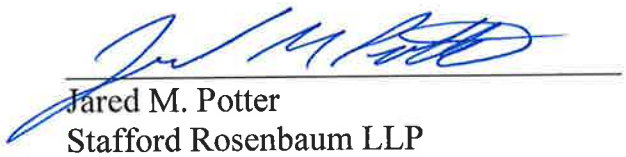

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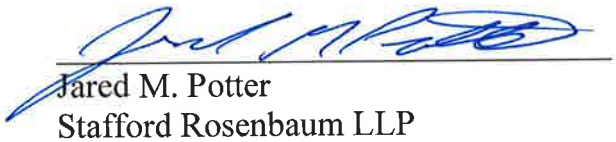

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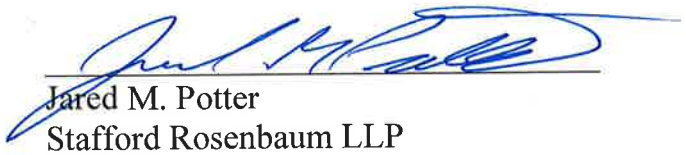

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