

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

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## **ARGUMENT**

### **I. The circuit court's decision not to impose a constructive trust was based on a mistake of law, not an exercise of discretion under the constructive trust doctrine.**

Lynnea states at page 10 of her brief that “[n]o one is maintaining – here or below- that ambiguity is a prerequisite to a constructive trust.” In doing so, *she* concedes that the court was not required to find an ambiguity before imposing a constructive trust. The court made no such concession.

Having determined the marital settlement agreement was unambiguous, the court declined to go further. It had the mistaken understanding that it was required to find an ambiguity before considering whether to impose a constructive trust. When Joan's counsel made equitable arguments, the court interjected that it was not interested in hearing about where the money went. (R. 254 at p. 11, l. 13 – p. 12, l. 4). Instead, the court wanted to hear about interpretation of the marital settlement agreement and whether or not the court had authority to even exercise its discretion to consider whether it was equitable to impose a constructive trust. *Id.* As the court stated, “I don't think we get to that point.” (R. 254 at p. 44, l. 2-3). “The parties voluntarily entered into the agreement at the

time of the divorce and the Court is going to uphold their agreement.” (R. 254 at p. 45, l. 17-20). The court never engaged in the analysis set forth in *Gorski v. Gorski*, 82 Wis. 2d 248, 262 N.W.2d 120 (1978) to determine if there was unjust enrichment and unconscionable conduct. If the court had considered the equities, it appears that it would have been inclined to impose a constructive trust: “[i]t’s not fair they’re not getting as much money.” (R.254 at p. 45, l. 1-2).

The court’s mistaken understanding that it was required to find an ambiguity in the martial settlement agreement before considering whether to impose a constructive trust was an error, which led to the court failing to consider the equities in the case.

**II. The lien provision does not preclude a finding of unjust enrichment.**

Under *Plumbers’ Woodwork Co. v. Merchants’ Credit & Adjustment Bureau*, 199 Wis. 466, 266 N.W. 303 (1929), cited by Lynnea, courts have authority to apply equitable principals, such as unjust enrichment and constructive trust, even where other legal redress is available. That case involved a garnishee-defendant seeking relief from a civil judgment, under then Section 269.46, that resulted from

its failing to respond to a summons and complaint. *Id.* at 304. The court declined to provide equitable relief but noted that Section 269.46 did not impose limitations on equitable powers of the courts in all circumstances. *Id.* at 305.

In this case, the family code specifically grants courts equitable authority to do “all acts necessary and proper to carry their orders and judgments into execution.” Wis. Stat. § 767.01(1); *Jefferds v. Scott*, 2001 WI App 6, ¶ 15, 240 Wis. 2d 506, 624 N.W.2d 384. Thus, it does not follow that the court is barred from finding unjust enrichment, or imposing a constructive trust, merely because there is a lien against James’ estate.

The fact that the lien provision was bargained for as part of a marital settlement agreement makes no difference. *Richards v. Richards*, 58 Wis. 2d 290, 296, 206 N.W.2d 134 (1973); *Singer v. Jones*, 173 Wis. 2d 191, 496 N.W.2d 156 (1992); and *Duhamel by Corrigan v. Duhamel*, 154 Wis. 2d 258, 453 N.W.2d 149 (Ct. App. 1989); and *Gorski v. Gorski*, 82 Wis. 2d 248, 255, 262 N.W.2d 120 (1978), cited by Joan, all involved life insurance provisions in marital settlement agreements that were freely bargained for and in which the court found unjust enrichment and imposed a constructive

trust. Those cases are distinguishable from *Greenlee v. Rainbow Auction/Realty Co.*, 202 Wis. 2d 653, 533 N.W.2d 257(Ct. App. 1996), cited by Lynnea, which involved a civil dispute over a real estate contract.

**III. The lien provision cannot save James from his unconscionable conduct.**

Lynnea's attempt to excuse James' wrongful conduct on grounds the parties included the lien provision in anticipation that one of them would fail to maintain the required insurance is illogical. It leads to the conclusion that James was free to choose to keep none of the insurance in place, fail to provide for the children in a will or a trust, and simply leave the children to collect what they could through a lien against James' miniscule estate, with no consequence. Under that reasoning, the lien provision is not a remedy at all, it is just another option available to the parties to fulfill the insurance provision. Even if one party were to verify that the required insurance was in place, the other party could change the beneficiary designations after providing verification. Such an outcome was clearly not what the parties intended.

James failed to maintain the children as beneficiaries on his life insurance policies as required by the divorce judgment.

His failure to do so would be grounds for contempt if he were alive. His wrongful conduct was unconscionable.

**IV. Imposing a constructive trust would not render the lien provision valueless.**

Joan and the children certainly have the option of enforcing the lien against James' estate in a probate proceeding to recover whatever value is available. In this case, it appears that the funds in the probate proceeding are insufficient to make the children whole. (R. 254 at p. 29, l. 9-25). However, the martial settlement agreement does not specifically state that the lien against James' estate must be enforced through probate proceedings, nor does it state that the lien is the sole mechanism available to the court for enforcing the life insurance provision. Thus, the terms of the martial settlement agreement allow for recovery of the value of the life insurance proceeds through non-probate assets and through a constructive trust.

Ironically, requiring enforcement of the lien exclusively through probate could render the lien provision valueless. A

party could simply fail to maintain the required life insurance<sup>1</sup>, fail to fulfill the life insurance obligation through a will or a trust, and then set up his or her remaining assets so that they pass outside of probate leaving nothing for the children to recover. This is contrary to the divorce judgment.

Further, the probate and family courts have concurrent jurisdiction until the final court-ordered disposition of marital property. *Roeder v. Roeder*, 103 Wis. 2d 411, 420, 308 N.W.2d 904 (Ct. App. 1981). The life insurance James was *required* to maintain has not been fully disposed of pursuant to the court-ordered disposition; it went to Lynnea, not the children. Thus, it is well within the family court's authority to use an equitable tool, like a constructive trust, to enforce the life insurance provision.

### **CONCLUSION**

The circuit court had the authority to impose a constructive trust and the equities in this case weigh in favor of imposing such a trust. This court should grant Joan's motion and impose a constructive trust or remand the matter to the circuit court to apply the constructive trust doctrine.

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<sup>1</sup> Alternatively, the party could borrow against the policies or otherwise encumber them so as to effectively eliminate any death benefit the children would receive.

Dated this 18<sup>th</sup> day of July, 2018.

By:

A handwritten signature in blue ink, appearing to read "Dan J. O'Brien", written over a horizontal line.

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## **CERTIFICATIONS**

### **I. CERTIFICATION AS TO FORM AND LENGTH.**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced with a proportional serif font as modified by the Court's May 24, 2018, Order. The length of this brief is 1,340 words.

### **II. CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12).**

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of 809.19(12). I further certify that this 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.

III. CERTIFICATION AS TO CONFIDENTIALITY.

I hereby 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 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 at Milwaukee, Wisconsin, this 18<sup>th</sup> day of July, 2018.

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