Appeal No. 18AP712-FT

SUPREME COURT OF WISCONSIN

JOAN C. PULKKILA,

Petitioner-Appellant,

v.

JAMES M. PULKKILA,

Respondent,

LYNNEA LANDSEE-PULKKILA,

Other Party-Respondent-Petitioner.

On Appeal from the Circuit Court for Waukesha County
The Honorable Paul Bugenhagen, Jr., Presiding
Circuit Court Case No. 2008FA000696

OTHER PARTY-RESPONDENT-PETITIONER LYNNEA LANDSEE-PULKKILA'S OPENING BRIEF

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ISSUES PRESENTED FOR REVIEW

1. Does a marital settlement agreement expressly providing a remedy that "shall" apply if either party fails to maintain life insurance provide an exclusive remedy such that a constructive trust is unavailable by operation of law?

Court of appeals answered: No.

Circuit court answered: Yes.

2. Did the court of appeals violate Petitioner's right to due process under the federal and state constitutions by imposing a constructive trust as a matter of law, without remand, before any court heard evidence related to the elements of constructive trust or adjudicated Petitioner's objection to Joan Pulkkila's legal standing to move for a constructive trust in the divorce proceeding?

Court of appeals answered: No.

STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

This case involves important issues of contract law and family law. Both oral argument and publication are merited.

STATEMENT OF THE CASE

The facts are undisputed. Petitioner-Appellant Joan C. Pulkkila ("Joan"), and James M. Pulkkila ("James"), were married October 28, 1996 and divorced July 14, 2009. (App. 013-014.) They negotiated and entered into a marital settlement agreement ("MSA") and the circuit court incorporated it into the judgment of divorce. Article V of their MSA required both Joan and James to maintain life insurance:

> 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.

(App. 026.) It also anticipated the possibility that one party would breach that requirement and provided a remedy:

> 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.

(App. 027.) James died November 10, 2015. (App. 038 ¶14.) At that time, James's life insurance policy designated his wife, Other Party-Respondent-Petitioner Lynnea Landsee-Pulkkila ("Lynnea"), as primary beneficiary. (App. 038 ¶¶12-13.)

On May 17, 2017, more than eighteen months after James's death, Joan sought to reopen the divorce proceeding and join Lynnea as a party for the purposes of imposing a constructive trust on the life insurance proceeds. (App. 035-036.) Lynnea objected, challenging whether the family court was the proper forum and, in particular, whether Joan had standing in her own right to seek the imposition of a constructive trust. (App. 069-074.)

Following briefing by the parties, the circuit court deferred the standing question and took up what it considered the threshold issue—whether the MSA's inclusion of an express remedy for failure to maintain the required life insurance precluded the imposition of a constructive trust. (App. 092:16-20.) The court determined that a constructive trust was unavailable because the MSA contained an

unambiguous and bargained-for remedy to control in the event that a party failed to maintain the required level of life insurance. (App. 119:4-14.) It denied Joan's motion for a constructive trust and denied her motion to reconsider that decision. (App. 124-125, 126.)

In light of its dispositive determination on the threshold question, the circuit court had no occasion to decide whether Joan had standing. Additionally, the court took no testimony, heard no evidence, and made no rulings regarding the competing arguments as to whether the elements for constructive trust had been met. (App. 120:5-11.)

Joan appealed. (App. 127.) The court of appeals held that the express remedy provided by the MSA did not preclude imposition of a constructive trust, and it further imposed a constructive trust on the proceeds of the policy. (App. 007 ¶10.) Judge Hagedorn dissented, recognizing both that the MSA precluded recourse to the doctrine of constructive trust and that, even if a constructive trust was potentially available, due process required further proceedings in the circuit court.

(App. 009 ¶¶15, 18 (Hagedorn, J., dissenting).) This Court granted review. (App. 129.)

STANDARD OF REVIEW

Whether to impose a constructive trust requires a two-tiered inquiry. Legal questions, such as the application of the parties' agreed-upon contractual remedy, are reviewed *de novo*. *Sulzer v. Diedrich*, 2003 WI 90, ¶16 263 Wis. 2d 496, 664 N.W.2d 641. The equitable determination of whether the facts warrant a constructive trust is an exercise of discretion. *Id.* "[A]n exercise of discretion based on an erroneous application of the law is an erroneous exercise of discretion." *Estate of Kriefall v. Sizzler USA Franchise, Inc.*, 2012 WI 70, ¶15, 342 Wis. 2d 29, 816 N.W.2d 853 (quoting *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997)).

ARGUMENT

I. THIS COURT SHOULD ENFORCE THE EXPRESS, BARGAINED-FOR REMEDY PROVIDED IN THE MARITAL SETTLEMENT AGREEMENT.

This Court should reverse the imposition of a constructive trust and enforce the specific remedy James and Joan bargained for and included in their MSA. In Article V of the MSA, James and Joan anticipated the possibility that one of them would breach the life insurance requirements and agreed upon a simple, unambiguous remedial provision. That provision grants a monetary remedy in the event one party does not maintain life insurance as required. (App. 027.) The parties bargained for this remedy and expressly agreed to be bound by it when they signed the MSA. (App. 033.) The circuit court gave its imprimatur by incorporating the MSA into the final divorce judgment. (App. 014 ¶10, 019 ¶14, 021.)

The remedial provision is legally binding. Where, as here, "a contract specifies remedies available for breach of contract, the intention of the parties generally governs." *Ash Park, LLC v. Alexander & Bishop, Ltd.*, 2010 WI 44, ¶37, 324

Wis. 2d 703, 783 N.W.2d 294. This Court has long recognized that it is not for judges to "rewrite a contract made by the parties." *Columbia Propane, L.P. v. Wis. Gas Co.*, 2003 WI 38, ¶12, 261 Wis. 2d 70, 661 N.W.2d 776 (internal quotation marks omitted). Moreover, because the MSA contains a bargained-for legal remedy, no equitable remedy—including a constructive trust—is available. *See, e.g.*, *Guaranteed Inv. Co. v. St. Croix Consol. Copper Co.*, 156 Wis. 173, 176, 145 N.W. 662 (1914). Accordingly, this Court should enforce the terms of the remedial provision as the exclusive remedy for the breach of contract at issue.

A. The MSA anticipated and expressly provided a remedy for breach of contract, and this Court should enforce it as written.

Joan and James clearly valued life insurance in negotiating their MSA. They agreed that both of them would maintain life insurance. (App. 026.) They included a mechanism by which each of them always had the opportunity to monitor the other's compliance with this requirement. (App. 026.) And they provided a bargained-for remedy in the event

one of them breached the life insurance requirement: "a valid and provable lien against his or her estate." (App. 027.)

MSAs are contracts. *See In re Boyd's Estate*, 18 Wis. 2d 379, 381, 118 N.W.2d 705 (1963) (citing *Miner v. Miner*, 10 Wis. 2d 438, 444, 103 N.W.2d 4 (1960), *abrogated on other grounds by In re Rohde-Giovanni v. Baumgart*, 2004 WI 27, 269 Wis. 2d 598, 676 N.W.2d 452). Overriding an express, bargained-for contractual provision contravenes fundamental principles of Wisconsin law, including freedom of contract.

This Court recently reiterated that freedom of contract is a fundamental element of liberty that requires courts "to enforce contracts deliberately made by the parties rather than set them aside." *Midwest Neurosciences Assocs., LLC v. Great Lakes Neurosurgical Assocs., LLC*, 2018 WI 112, ¶39, 384 Wis. 2d 669, 920 N.W.2d 767 (quoting *Baierl v. McTaggart*, 2001 WI 107, ¶12, 245 Wis. 2d 632, 629 N.W.2d 277). To vindicate that principle, courts avoid interpreting agreements in ways that render provisions valueless. *See, e.g., Duhame v.*

Duhame, 154 Wis. 2d 258, 264-65, 453 N.W.2d 149, 151-52 (Ct. App. 1989) (citing *In re Boyd's Estate*, 18 Wis. 2d at 381).

Joan and James bargained for the remedial provision in their MSA. Now that a breach has occurred, the remedial provision should be enforced as written.

Under settled principles of contract interpretation, courts will "enforce [contractual language] as written ... to avoid rewriting the contract by construction." *Danbeck v. Am. Family Mut. Ins. Co.*, 2001 WI 91, ¶10, 245 Wis. 2d 186, 629 N.W.2d 150. The remedial provision is not ambiguous. "[U]nless the contract is ambiguous, we stick to 'the four corners of the contract, without consideration of extrinsic evidence.'" *Midwest Neurosciences Assocs., LLC*, 2018 WI 112, ¶138 (R.G. Bradley, J., dissenting) (quoting *Town Bank v. City Real Estate Dev., LLC*, 2010 WI 134, ¶33, 330 Wis. 2d 340, 793 N.W.2d 476).

For those reasons, Joan and James's intent—to provide *ex ante* a remedy in the event one of them breached the life

insurance requirements—should control.[1] *Ash Park, LLC*, 2010 WI 44, ¶37. The Court should not superimpose its will over an express and unambiguous remedial provision negotiated by the parties and incorporated into their final divorce judgment. *See, e.g.*, *Columbia Propane, L.P.*, 2003 WI 38, ¶12 ("contracts must be construed as they are written").

B. An express legal remedy provided by contract forecloses equitable alternatives, including a constructive trust.

Where, as here, the parties anticipated the possibility of breach and provided an express remedy, recourse to equity is inappropriate. "[E]quity ... will not interfere to afford relief where legal redress is available." *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, 186 N.W. 215 (1922)). This Court has held that express contract provisions specifying remedies

[1] "[E]nforcing the MSA as written, including the remedy provision, *is* ensuring the intent of the parties is carried out--- and therefore, would not constitute the requisite unjust enrichment and unfairness necessary to trigger imposition of a constructive trust." (App. 009 ¶14 (Hagedorn, J., dissenting).)

should be enforced. *See, e.g.*, *Ash Park, LLC*, 2010 WI 44, ¶37. The parties selected a lien against the estate as their remedy for failure to maintain the children as beneficiaries of life insurance.[2] (App. 027.) As noted by Judge Hagedorn in his dissent, the parties could have included other remedies, like a constructive trust or a catchall provision, but they chose not to. (App. 009-010 ¶15 (Hagedorn, J., dissenting).) Enforcing the parties' agreement and the remedies they have chosen renders equitable relief, including the constructive trust imposed by the court below, unavailable. *See, e.g.*, *Guaranteed Inv. Co.*, 156 Wis. at 176.

The doctrine of constructive trust, on its own terms, is inapplicable. As this Court recently explained, "a constructive trust is an equitable device used to address situations in which the legal and beneficial interests in a particular piece of property lie with different people." *Tikalsky v. Friedman*, 2019

[2] The court of appeals dismissed the lien remedy as "meaningless" (App. 003 ¶4), but that conclusion was premature, as it depends on resolution of factual questions not yet resolved in the circuit court. This issue cannot be prejudged absence presentation and weighing of the relevant facts.

WI 56, ¶18, 386 Wis. 2d 757, 928 N.W.2d 502. This device was "created by law to prevent unjust enrichment." *Wilharms v Wilharms,* 93 Wis. 2d 671, 678-79, 287 N.W.2d 779 (1980). But under Wisconsin law, "unjust enrichment does not apply where parties have entered into a contract" and the unjust enrichment claim is "premised on the parties' contractual relationship." *Meyer v. The Laser Vision Inst.*, 2006 WI App 70, ¶¶22, 28, 290 Wis. 2d 764, 714 N.W.2d 223 (citing *Greenlee v. Rainbow Auction/Realty Co.*, 202 Wis. 2d 653, 671-72, 553 N.W.2d 257 (Ct. App. 1996)). Thus, Joan and James's inclusion of the express remedial provision in the MSA forecloses recourse to the doctrine of unjust enrichment, and therefore precludes the remedy of a constructive trust.

This Court's *Tikalsky* decision mapped out "two potential paths by which a person may pursue a constructive trust against property in another's possession":

> First, the plaintiff may directly assert a claim against the defendant (as described above) claiming she has been unjustly enriched and that the circumstances by which the unjust enrichment arose satisfy the "additional showing" described by *Gorski* [*v. Gorski*, 82 Wis. 2d 248, 262 N.W.2d 120 (1978)]. Or second, the plaintiff may prove

> that the defendant came into possession of property that was already burdened with a constructive trust.

2019 WI 56, ¶23. The facts of the present case do not adhere to either path, reinforcing that a constructive trust is not available here.

Tikalsky's first path is foreclosed because it is based on unjust enrichment. As discussed above, the doctrine of "unjust enrichment does not apply where the parties have entered into a contract." *Greenlee*, 202 Wis. 2d at 671. Even if unjust enrichment can apply, there is a no evidentiary support here, either for unjust enrichment or for the necessary "additional showing" that warrants imposition of a constructive trust. *Tikalsky*, 2019 WI 56, ¶21.[3]

Even in the event that unjust enrichment applied to the facts of this case, it is foreclosed by the limitations established in *Tikalsky*. The court of appeals proposes that constructive trust is available outside of unjust enrichment. (App. 005 ¶6

[3] In *Gorski*, this Court indicated that the "additional showing" element requires an act of misfeasance, such as "actual or constructive fraud, duress, abuse of confidence, mistake, commission of a wrong, or by any form of unconscionable conduct," that induced the unjust enrichment of the new beneficiary of the property interest. *Gorski*, 82 Wis. 2d at 255.

n.3.) This is simply untrue. Relying solely on a single, unpublished decision, the court of appeals declared that Wisconsin "case law encompasses a broader concept of unjust enrichment in the context of constructive trust." (App. 005 ¶6 n.3 (citing *McDonah v. McDonah,* No. 2014AP712, unpublished slip op. ¶¶11-12 (Wis. Ct. App. Dec. 23, 2014).)[4] This was an error of law. The court of appeals found support for its broad assertion only in dicta from *McDonah*—non-binding language within a non-precedential decision. The reasoning does not withstand scrutiny on its own terms.[5] Moreover, since the court of appeals decision, this Court decided *Tikalsky*, which is incompatible with the lesson the court of appeals took from *McDonah*.

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[4] The only other decision that has cited *McDonah* was the court of appeals' decision in *Tikalsky*, which this Court reversed. *See Tikalsky v. Stevens*, No. 2017AP170, unpublished slip op. ¶12 (Wis. Ct. App. May 30, 2018), *rev'd sub nom. Tikalsky v. Friedman*, 2019 WI 56.

[5] The portion of *McDonah* the court of appeals relied on is dicta, because it is not necessary to the dispositive conclusion that the contractual obligation had lapsed and there was no wrongful conduct. (App. 157 ¶17.) Moreover, that dicta does not address whether constructive trust is an available remedy for a breach of contract, but instead focuses on identifying the elements for a constructive trust. (App. 154-155 ¶¶11-12.) In sum, *McDonah* not only lacks precedential value, but also fails to establish the proposition for which the court of appeals cited it.

Tikalsky reaffirmed that a constructive trust is available only in a narrow subset of unjust enrichment cases—those where evidence establishes not only unjust enrichment, but also the "additional showing" mandated by *Gorski*. Contrary to this holding, *McDonah* (and the court of appeals in this case) broadened the availability of constructive trusts by jettisoning the "additional showing" requirement and also authorizing the remedy is cases outside the doctrinal bounds of unjust enrichment. Such an expansive approach contravenes both *Tikalsky* and precedent holding that "[a] constructive trust will be imposed only in limited circumstances." *E.g.*, *Sulzer*, 2003 WI 90, ¶20 (quoting *Wilharms*, 93 Wis. 2d at 678-79).

Even if the court of appeals' expansive view of unjust enrichment is valid, because the circuit court found a threshold issue dispositive, it took no testimony, heard no evidence, and made no rulings regarding the competing factual arguments. Accordingly, there is no factual basis to substantiate any "additional showing," and neither Joan nor the court of appeals

made any attempt to fulfill this required element for imposing a constructive trust under *Tikalsky*'s first path.

Tikalsky's second path is likewise foreclosed here. Using *Richards v. Richards,* 58 Wis. 2d 290, 206 N.W.2d 134 (1973), as an exemplar, this Court explained that, under certain circumstances, life insurance proceeds are "already burdened with a constructive trust." *Tikalsky*, 2019 WI 56, ¶23. But this case deviates from *Richards* in a material way. Mr. Richards (like James) violated his divorce judgment by designating his second wife as beneficiary of his life insurance. But Mr. Richards (unlike James) did not have in his divorce decree an express provision anticipating such a breach and specifying the agreed-upon remedy. The *Richards* Court imposed a constructive trust because there (unlike here) the parties had not provided a remedy. *Id.* at ¶31 (citing *Richards*, 58 Wis. 2d at 296).

To impose a constructive trust here via *Tikalsky*'s second path would require holding that Joan and James's life insurance proceeds were "already burdened with a constructive

trust," *Tikalsky*, 2019 WI 56, ¶23, at the time they signed their MSA and the circuit court entered their final divorce judgment. Such a ruling would override the express remedial provision that they negotiated and the circuit court approved, leaving that provision as nothing more than contractual surplusage. This the court cannot do.

"In constructing a contract, 'courts cannot insert what has been omitted or rewrite a contract made by the parties,'" *Columbia Propane, L.P.*, 2003 WI 38, ¶12 (quoting *Levy v. Levy*, 130 Wis. 2d 523, 533, 388 N.W.2d 170 (1986)), and "contract language should be construed to give meaning to every word, 'avoiding constructions which render portions of a contract meaningless, inexplicable or mere surplusage,'" *Md. Arms Ltd. P'ship v. Connell*, 2010 WI 64, ¶45, 326 Wis. 2d 300, 786 N.W.2d 15 (quoting *Kasten v. Doral Dental USA, LLC*, 2007 WI 76, ¶48, 301 Wis. 2d 598, 733 N.W.2d 300). In dissent, Judge Hagedorn recognized that the mandatory lien language would not make sense if other remedies could be

pursued, rendering the provision meaningless. (App. 009-010 ¶15 (Hagedorn, J., dissenting).)

In imposing a constructive trust here, the court of appeals strayed from precedent. The express remedial provision in the MSA precludes the equitable remedy of constructive trust, as well as the underlying doctrine of unjust enrichment, and no record evidence supports the "additional showing" otherwise necessary to impose a constructive trust. Further, there are no grounds for finding that the constructive trust existed before the court of appeals' decision.

C. Enforcing the express, negotiated remedial provision in the MSA furthers public policy.

"Wisconsin public policy favors freedom of contract." *Parsons v. Associated Banc-Corp*, 2017 WI 37, ¶31, 374 Wis. 2d 513, 893 N.W.2d 212 (quoting *Solowicz v. Forward Geneva Nat'l, LLC*, 2010 WI 20, ¶34, 323 Wis. 2d 556, 780 N.W.2d 111). This reflects the settled determination that "it is in the public interest to accord individuals broad powers to order their affairs through legally enforceable agreements." *Id.* (quoting *Ash Park*, 2015 WI 65, ¶38 n.24). Enforcing the remedial

provision bargained for and agreed to by two represented parties is the antithesis of injustice. *See, e.g.*, *Fleischman v. Zimmermann*, 258 Wis. 194, 198-199, 45 N.W.2d 616 (1951) ("It cannot be held that it is contrary to public policy to enforce contracts entered into for a valuable consideration with full knowledge of the contents thereof.").

Joan's counsel recognizes that the MSA was "[f]reely bargained for by parties fighting tooth and nail in a divorce." (App. 099:3-5.) The circuit court understood it as such, recognizing the express remedial provision "is what the parties bargained for." (App. 119:11.) It should be enforced as a contract. The parties knew the negotiated terms, were aware of the remedies, and expected those terms would be enforced by the court. The imposition of a constructive trust here, overriding the parties' express provision of an exclusive remedy for breach of the life insurance provision, would violate freedom of contract.

The practice of specifying in advance a remedy to apply if one party fails to maintain insurance coverage as agreed has

been widely adopted in family law. This practice allows parties to consider *ex ante* their remedial options and minimizes the uncertainties, unpleasantness, and costs of later litigation. In every respect, this approach advances public policy.

The inclusion in divorce judgments of express remedial provisions for violations of insurance requirements caught on in response to cases—like the *Richards* decision discussed above—that imposed constructive trusts as an operation of law. Family law practitioners identified an unfortunate pattern: violations of insurance requirements in divorce decrees triggered extensive, expensive, and fact-intensive litigation over whether equitable remedies applied given the specific family circumstances. In response, they adopted a solution: add into MSAs negotiated remedial provisions that would minimize such litigation if there was a breach of the parties' insurance agreement.

The State Bar of Wisconsin's family law forms manual recommends this solution. (App. 140 (Gregg M. Herman & Kelly J. Shock, *Family Law in Wisconsin: A Forms and*

Procedure Handbook at 8-27 (9th ed. 2016-2017).) Indeed, this model provision has appeared in the family law forms manual for nearly three decades. *See* Leonard L. Loeb, *System Book for Family Law: A Forms and Procedure Handbook for Divorce* at 8-23 (3rd ed. Feb. 1991 Supp.). Countless parties in Wisconsin have likely included this recommended provision in their divorce agreements.

James and Joan agreed to include a remedial provision in their MSA for these same reasons. To undermine that decision would not only render the provision meaningless and vitiate their bargain, it would also cast doubt upon the common practice of including such provisions in MSAs. That would be a significant mistake with vast consequences.

Courts must avoid interpreting agreements in ways that render provisions valueless. *See, e.g.*, *Duhame*, 154 Wis. 2d at 264-65 (citing *In re Boyd's Estate*, 18 Wis. 2d at 381). MSAs are negotiated contracts. Allowing courts to change the terms of MSAs years after the final divorce judgment would open the door to parties attempting to abandon or unilaterally reform

their agreements. This would undermine bedrock principles in the fields of contracts and family law. Worse, where (as here) parties negotiate remedial provisions to curb future litigation, the result will be the antithesis of what they intended. For courts to circumvent parties' agreements contravenes settled legal principles and creates bad public policy.

Nor do the specific facts of this case overcome the broader policy concerns at issue. The necessity of enforcing voluntary agreements (cemented in court orders) overrides any perceived unfairness in this particular case. And, before lamenting the outcome here, it is essential to remember that the facts remain largely contested and there has not yet been an opportunity to adjudicate them. The court of appeals' decision is based on untested assertions and unproven allegations. (*See* App. 011 ¶18 (Hagedorn, J., dissenting).) It is not a sound basis for deciding this case, much less for issuing a decision with far-reaching policy implications.

Moreover, it is important to consider the role Joan played in how the express remedial provision played out in this

case. The MSA expressly empowered Joan to monitor the beneficiary designations by requesting, at any time and as often as she wished, "evidence of there being [required] insurance in force and proof of beneficiary designation." (App. 026.) The record reflects, without contradiction, that Joan never enforced those contractual rights. (App. 109:11-17.) Had she done so, she could have decided at that time—prior to James's death—either to require James change the designation or to depend on the remedial provision providing a lien against his estate. By her inaction, Joan chose to rely exclusively on the MSA's remedial provision providing a lien against his estate. Only after she was dissatisfied with the result did she assert, for the first time, that the MSA should not control. It is not, and should not be, the courts' task to rewrite contracts when one party is dissatisfied with the outcome they selected.

The Court should enforce the remedial provision in Joan and James's MSA. Doing so not only comports with the law and the parties' expectations, but it also furthers public policy.

II. IMPOSING A CONSTRUCTIVE TRUST WITHOUT ADDITIONAL CIRCUIT COURT PROCEEDINGS VIOLATES DUE PROCESS.

Both the U.S. and the Wisconsin Constitutions guarantee due process. *See* U.S. Const. amend. XIV, § 1; Wis. Const. art. I, § 1. As a matter of fundamental fairness, due process requires a meaningful opportunity to present arguments. *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *In re Stasey v. Miller*, 168 Wis. 2d 37, 59, 483 N.W.2d 221 (1992). Where a decision-maker fails to address an argument properly advanced by a party, that party suffers a due-process violation. *See, e.g.*, *Morgan v. United States*, 298 U.S. 468, 480-81 (1936) ("If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."); *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3d Cir. 2001) (quoting *Llana-Castellon v. INS*, 16 F.3d 1093, 1096 (10th Cir. 1994)) ("A decisionmaker 'must actually consider the evidence and argument that a party presents.'").

Here, the circuit court has not completely adjudicated the matter. Its determination that a constructive trust was unavailable as a matter of law was dispositive and led to this appeal. That ruling obviated the need to resolve other potentially dispositive issues and to adjudicate factual disputes. Indeed, the trial court stated on the record that, if its legal ruling were reversed on appeal, then the parties would turn to these other issues on remand. (App. 121:1-9 ("[I]f the Court above me disagrees, they are going to send this back for further evidence .... I believe that if I am overturned, the Court will give some instructions that we have to have a hearing as to what to do with this constructive trust.").)[6]

But, because the court of appeals denied a remand, Lynnea had no opportunity to present her arguments or her evidence on these issues that the circuit court delayed. As a result, she has not been heard on the subject of, and the circuit

[6] In one illustration of how precipitous its decision was, the court of appeals acknowledged that one of the most basic facts, "his oldest child's age at the time of James's death," was not clearly established in the record. (App. 003 n.1.)

court has not made findings on, several crucial issues of law and fact, including:

- Whether Joan has standing to seek a constructive trust;
- Whether the divorce proceeding is the proper forum for this dispute;
- Whether Lynnea has a marital property interest in the life insurance proceeds, given that James used marital income to pay the policy premiums;
- Whether the life insurance proceeds should be reduced by the amount of other compensation the children received due to James's death[7]; and
- The extent to which equity commands the constructive trust be funded (*i.e.*, should all insurance proceeds be included or only the portion equal to child support that James would have paid had he survived).

By imposing a constructive trust, without considering these issues of law and fact or remanding for the circuit court to do so, the court of appeals denied Lynnea due process.

The imposition of a constructive trust over the insurance proceeds takes those funds away from Lynnea. The due-

[7] Such compensation includes not only probate assets but also others sources that were not considered by the court of appeals, namely Social Security benefits and proceeds from a wrongful death lawsuit.

process guarantee requires a full and fair hearing before deprivation of property. *See, e.g.*, *Milwaukee Dist. Council 48 v. Milwaukee Cty.*, 2001 WI 65, ¶48, 244 Wis. 2d 333, 627 N.W.2d 866. Here, the circuit court never advanced past the threshold question of whether the express remedial provision of the MSA excluded the imposition of equitable remedies.

If the circuit court erred on the threshold question (and, to be sure, it did not), due process entitles Lynnea to a hearing about whether the equitable remedy of a constructive trust is warranted. *See In re Estate of Rille ex rel. Rille v. Physicians Ins. Co.*, 2007 WI 36, ¶60, 300 Wis. 2d 1, 728 N.W.2d 693 (fundamental fairness analysis is "bottomed in guarantees of due process which require that a person must have had a fair opportunity procedurally, substantively and evidentially to pursue the claim"). Therefore, at minimum this Court should vacate the court of appeals' imposition of a constructive trust and the case to the circuit court for determination of Joan's standing and, if necessary, an evidentiary hearing.

CONCLUSION

For these reasons, this Court should reverse the court of appeals decision, vacate the imposition of a constructive trust, and enforce the express remedial provision of the MSA.

Dated: July 11, 2019

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FORM & LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the portions of this brief referred to in § (Rule) 809.19(1)(d), (e), and (f) is 4,740 words.

Dated: July 11, 2019

Jeffrey A. Mandell

APPENDIX CERTIFICATION

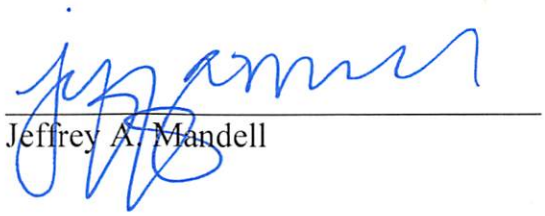
I hereby certify that filed with this brief, as a separate document, is an appendix that complies with Wis. Stat. § (Rule) 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinions of the courts below; (3) a copy of any unpublished opinion cited under Wis. Stat. § (Rule) 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised.

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 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 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: July 11, 2019



Jeffrey A. Mandell

CERTIFICATE OF MAILING/DELIVERY

Pursuant to Wis. Stat. § (Rule) 809.80(3)(b) and (4), I certify that on July 11, 2019, the required copies of this Brief and Appendix were delivered to a third-party commercial carrier (Federal Express) for delivery within 1 (one) business day to:

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I further certify that the required copies of this Brief and Appendix were hand-delivered to:

Clerk of Wisconsin – Supreme Court
110 East Main Street
Madison, WI 53703

Dated: July 11, 2019

Jeffrey A. Mandell

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certified that I have submitted an electronic copy of this Brief, which complies with the requirement of Wis. Stat. § (Rule) 809.19(12). I further certify that the text of the electronic Brief is identical to the text of the paper copy of the Brief filed as of this date. A copy of this certificate has been served with the paper copies of the Brief with the Court and served on all opposing parties.

Dated: July 11, 2019

Jeffrey A. Mandell