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STATE OF WISCONSIN
SUPREME COURT

In the marriage of:

Joan C. Pulkkila,

Petitioner-Appellant

v.

James M. Pulkkila,

Respondent,

Lynnea Landsee-Pulkkila,

Other Party-Respondent-Petitioner.

Court of Appeals, District II
Appeal No. 18AP712-FT
Circuit Court Case No.
08-FA-000696

PETITIONER-APPELLANT'S RESPONSE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUES PRESENTED

1. Does a marital settlement agreement incorporated into a judgment of divorce that provides that one party "shall" have a lien against the other party's estate if the first party fails to maintain the required life insurance prohibit the court from imposing a constructive trust over the life insurance proceeds?

   Court of appeals answered no.

   Circuit court answered yes.

2. Did the court of appeals violate the other party-respondent-petitioner's due process rights under the federal and state constitutions when it imposed a constructive trust based on undisputed facts?

   Court of appeals answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This matter is scheduled for oral argument on Monday, October 14, 2019, at 1:30 p.m. at the Marquette County Courthouse in Montello, WI.

Publication of the decision in this case is appropriate in order to clarify application of the constructive trust doctrine in family law cases in conjunction with this Court's recent decision in *Tikalsky v. Friedman,* 2019 Wis 56, 386, Wis. 2d 757, 928 N.W.2d 502.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is an appeal from the Court of Appeals, District II decision dated and filed February 27, 2019, in which the court of appeals reversed the Circuit Court of Waukesha County, which refused to impose a constructive trust to enforce the life insurance provision in a judgment of divorce, and remanded the case for imposition of a constructive trust.

II. STATEMENT OF FACTS

The Petitioner-Appellant, Joan C. Pulkkila ("Joan"), and Respondent, James M. Pulkkila ("James"), were married on October 28, 1996, and divorced on August 25, 2009. (App. 012-013). They had two minor children at the time of their divorce, Brittany and Grace. (App. 013). Article V(A) of their marital settlement agreement ("MSA"), incorporated into the divorce judgment, provides:

> 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 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.

(App. 026). James had a $250,000 Banner Life Insurance Policy in force at the time of the divorce, which named Joan as the beneficiary (hereafter "the policy"). (App. 062).

James married other party-respondent-petitioner, Lynnea Landsee-Pulkkila ("Lynnea") in 2013, and made her the beneficiary of the Banner policy on or about November 18, 2014, contrary to the MSA. (App. 038, 068). James died on November 10, 2015. (App. 038).

At the time of James' death, Brittany was 17 years old and Grace was 15. (App. 013). Lynnea made a claim for the proceeds of the policy and Banner Life Insurance paid her $250,091.60 on December 8, 2015. (App. 039, 068).

On May 17, 2017, Joan brought a post-judgment motion to enforce the life insurance provision in the divorce judgment. (App. 034). More specifically, Joan sought to implead Lynnea as a third party and have a constructive trust imposed on proceeds from James' life insurance policy that were paid to Lynnea in violation of the divorce judgment as a remedy for James' violation. (*Id.*) The trial court joined Lynnea to the action by an order entered July 14, 2017. (Supp. App. 3). A hearing was held on Joan's request for imposition of a constructive trust on October 20, 2017. (App. 075).

At the hearing, Lynnea's counsel confirmed that Lynnea received the insurance proceeds from the Banner Life Insurance Policy.[1] (App. 083, lines 16-18). Her counsel also stated that James "is not the first decedent to have changed a beneficiary designation that is anticipated under judgment of divorce," and that "he failed to maintain the insurance." (App. 100, lines 19-21; App. 106, lines 16-17). The trial court stated, in part:

> I guess, I'm going to go back to the language of the MSA. **If the language is not ambiguous, we don't get to the next question about the constructive trust,** and doing something other than what the agreement states. **The first obligation that you have is to convince me that this agreement is somehow ambiguous,** and that there is -- that this action, I guess, of Mr. Pulkkila is not -- was not contemplated and that there should be a remedy for that.

(App. 092, lines 17-25 (emphasis added)). The Court further stated:

> . . . I believe, we have to first examine whether or not there's ambiguity in their agreement before I go any further on this.

(App. 100, lines 3-5). Joan's counsel cited to *Sulzer v. Diedrich*, 2003 WI 90, 263 Wis. 2d 496, 664 N.W. 2d 641, to support the position that it was not necessary for the trial court to find an ambiguity before considering whether to impose a constructive trust. (App. 113-14). The trial court heard the arguments of

[1] Additionally, Lynnea's discovery responses filed at the October 20, 2017, hearing, indicate that she also received $50,000 from a Sun Life insurance policy through Mid-City Foundry Company, the employer James had at the time of the divorce. (R. 247).

counsel only, and did not take testimony. (App. 175-123). In its findings at the end of the hearing, the trial court stated:

> But the Court's job isn't to go back and fix the parties' agreement to make it fair now for the children. It's not fair they're not getting as much money. They lost their father. It is a rotten deal for them. However, this Court has to follow the law on it. The contract is not ambiguous to this Court. That is simply a question of law.

(App. 118, line 24 - App. 119, line 5).

The trial court denied Joan's motion to enforce the judgment and impose a constructive trust by an order entered on January 12, 2018. (App. 124-25). Joan filed a motion for reconsideration with a supporting brief and affidavit on January 31, 2018, (Supp. App. 5-117), which the trial court denied by an order entered on March 20, 2018. (App. 126).

Joan appealed and the court of appeals reversed and remanded for imposition of a constructive trust. (App. 007). The court of appeals held that "the circuit court erred in its belief that it was required to find ambiguity in the MSA in order to impose a constructive trust." (App. 004) The court of appeals further held that equity required imposition of a constructive trust over the insurance proceeds. (App. 007).

ARGUMENT

I. THE REMEDY OF A CONSTRUCTIVE TRUST IS AVAILABLE AND PROPER TO ENFORCE THE DIVORCE JUDGMENT.

"The circuit courts have jurisdiction of all actions affecting the family and have authority to do all acts and things necessary and proper in those actions and to carry their orders and judgments into execution as prescribed in [Chapter 767]." Wis. Stat. § 767.01(1) (2015-16). Family courts are courts of equity. *Jeffords v. Scott (Jeffords)*, 2001 WI App 6, ¶15, 240 Wis. 2d 506, 624 N.W.2d 384.

"A constructive trust is imposed by a court of equity to prevent unjust enrichment arising when one party receives a benefit, the retention of which would be unjust as against the other." *Tikalsky* at ¶ 20. "A constructive trust is what arises when the defendant violates an antecedent duty that will leave him unjustly enriched." *Id.* "It is the defendant's obligation to perform the duty that is the cause of action." *Id.* The constructive trust exists for the purposes of providing a remedy when he fails to do so." *Id.* It does not depend upon the intent of the parties to create an express trust. *Richards v. Richards*, 58 Wis. 2d 290, 296, 206 N.W.2d 134 (1973).

A. A constructive trust can be imposed without finding the MSA ambiguous.

The circuit court determined that it could not impose a constructive trust in this case on the grounds that the law requires the court to first find an ambiguity in the parties' MSA.[2] The circuit court determined that the MSA is unambiguous and went no further. The court of appeals correctly reversed. *Pulkkila v. Pulkkila,* 2018AP712 at ¶¶ 5-6.

The court of appeals reasoned that a constructive trust is an equitable remedy imposed to prevent unjust enrichment and unfairness to be applied "as necessary" to meet the needs of a particular case. *Id. citing Prince v. Bryant,* 87 Wis. 2d 662, 674, 275 N.W.2d 676 (1979) and *Richards v. Richards,* 58 Wis. 2d 290, 296, 206 N.W.2d 134 (1973). "If the other elements for imposing a constructive trust have been satisfied, and the holder of legal title is not a bona fide purchaser, a constructive trust may be imposed. *Id. citing Wilharms v. Wilharms,* 932 Wis. 2d 671, 678-79, 287 N.W.2d 779 (1980). "The circuit court erred in its belief that it was required to find ambiguity in the MSA in order to impose a constructive trust." *Id.* at ¶5.

The law on this issue is well developed, and the court of appeals' decision is consistent with a line of published Wisconsin cases imposing a

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[2] Lynnea, in her Petition, concedes that whether the insurance provision in the MSA is ambiguous is not a factor in determining whether or not a constructive trust is appropriate. (Pet. at 12.)

constructive trust when one party to a divorce fails to comply with the insurance provisions in an MSA that are incorporated into judgments of divorce without first finding an ambiguity.

In *Singer v. Jones*, 173 Wis. 2d 191, 496 N.W.2d 156 (1992), the court imposed a constructive trust on life insurance proceeds where the husband named his new wife the beneficiary of the policy in violation of his martial settlement agreement, without first finding an ambiguity. *Singer*, 173 Wis. 2d at 193-94, 198.

In *Richards*, the court imposed a constructive trust on life insurance proceeds where the husband changed the beneficiary of his life insurance from his children to his new wife in violation of the parties' marital settlement agreement, without first finding an ambiguity. *Richards*, 58 Wis. 2d at 292-93, 298-99.

Similarly, in *Sulzer*, the Wisconsin Supreme Court affirmed the court of appeals' imposition of a constructive trust on employee retirement benefits. *Sulzer*, 2003 WI at ¶ 44. The husband had changed the beneficiary designation on his retirement account from his first wife to his second wife in violation of the parties' divorce decree. *Id.* at ¶¶ 5-9. The divorce decree was unambiguous:

> We agree with the court of appeals and the circuit court that the divorce judgment, both written and oral

> pronouncements, ***clearly*** expressed Sulzer's and Fred's intent to divide equally the retirement accounts as of the date of the divorce. To allow Deidrich to retain the funds attributable to Sulzer's portion would thwart the intent of the parties and would be unjust to Sulzer.

Id. at ¶ 22 (emphasis added, citations removed). The clarity of the intent of the parties to the divorce decree in *Sulzer* actually assisted the court in imposing a constructive trust. Such clarity is the opposite of the ambiguity prerequisite that the trial court felt necessary it impose in this case.

The trial court in this case relied on a misinterpretation of *Duhame by Corrigal v. Duhame*, 154 Wis. 2d 258, 453 N.W.2d 149 (Ct. App. 1989). The trial court stated:

> You've based a lot of reliance on the *Duhame*, D-u-h-a-m-e, case, in which they did create the constructive trust. The court in that case found that -- first found though, that the language was ambiguous in their agreement, because it resulted in a valueless agreement.

(App. 111, lines 5-10).

Duhame involved a life insurance provision in a marital settlement agreement that was ambiguous as to whether it was support related or employment related. *Duhame*, 154 Wis. 2d at 266-67. Similar to this case, it involved a husband who changed the beneficiaries on his retirement benefits from his minor children to his new wife in violation of the marital settlement agreement. *Id.* at 263. The court of appeals first addressed the ambiguity in the marital settlement agreement, and then turned its attention to the

constructive trust doctrine. *Id.* at 268. The court then affirmed the trial court's imposition of a constructive trust relying, in part, on *Richards*. *Id.* at 267-68.

The trial court in the present case misinterpreted *Duhame* because it incorrectly treated the ambiguity issue as a precursor to considering whether or not the law allowed it to impose a constructive trust. It should have analyzed the ambiguity issue separately and distinctly, consistent with the court in *Duhame*. Nowhere in the *Duhame* decision does the court state that it is required to find an ambiguity in the marital settlement agreement as a precursor to imposing a constructive trust. This is consistent with the *Sulzer, Singer,* and *Richards* cases where constructive trusts were imposed without a finding of ambiguity. Ambiguity is not a necessary component to the determination of whether a constructive trust is appropriate. It was an error of the trial court in this case to hold that it was. The decision of the court of appeals should be affirmed.

B. The lien provision is not an impediment to imposing a constructive trust.

Lynnea is asking this Court to ignore the family court's statutory authority to enforce its divorce judgments and limit the interpretation of the MSA purely to contract construction. The court of appeals properly rejected this argument. *Pulkkila* at ¶ 9. Lynnea's position, that the only remedy

available to enforce the life insurance provision in the judgment is by making a claim in the probate court, is not sustainable under either the family court's statutory authority or the rules of contract law.

1. The lien provision is not an exclusive remedy.

Lynnea fails to acknowledge that MSAs, unlike other contracts, are incorporated into divorce judgments and are subject to the equitable powers of the family court. Jurisdiction of divorce actions in Wisconsin is governed by Wis. Stat. § 767.01, and the authority of the court is the express and incidental powers conferred by that statute, not the four corners of a contract. *Pettygrove by Scholl v. Pettygrove,* 132 Wis.2d 456, 465, 393 N.W.2d 116 (Wis. App. 1986). Thus, the fact that a remedy or any other provision in an MSA may have been bargained for as part of a contractual agreement between parties does not strip the family court of its equitable authority to enforce its judgments.[3]

The MSA contains no limiting language that the lien is the sole or exclusive remedy. (App. 026-27) The provision says Joan "shall" have a lien but it does not say that Joan *shall* pursue the lien in probate court to the

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[3] *See also Franke v. Franke,* 2004 WI 8, ¶ 39, 268 Wis. 2d 360, 384–85, 674 N.W.2d 832, 843 ([w]hile "the parties [to a divorce] are free to contract, ... they contract in the shadow of the court's obligation to review the agreement on divorce to protect the spouses' financial interests on divorce." Further, "[w]hen a court follows and adopts an agreement of the parties making it a part of its judgment, the court does so on its own responsibility, and the provisions become its own judgment."

exclusion of all other remedies. (*Id.*) The provision "expressly" provides for the lien but it does not *expressly* limit the remedies available to the parties. (*Id.*) Joan has the option of proceeding in probate court, and she has pursued that option,[4] but it is not the only remedy available to her. Imposing a constructive trust would not involve rewriting the MSA. It would simply involve the family court utilizing an equitable remedy to enforce its judgment according to its statutory authority.

In addition, the divorce judgment provides an additional remedy for non-compliance with the life insurance provision through contempt proceedings under Chapter 785. (App. 020). As Lynnea points out, the life insurance provision gives Joan the authority to review the beneficiary designations on James' life insurance. (App. 040). If Joan had sought to review the beneficiary designations and had seen that James failed to maintain the required life insurance while he was alive, Joan presumably had the option to pursue enforcement through contempt proceedings to force James to change the designations and maintain the proper insurance.[5] This is something Joan could not do if her only option were to wait for James to die

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[4] Joan has pursued the lien in probate court to no end as it appears there are insufficient funds in the probate matter to remedy James' failure to maintain the proper life insurance.
[5] At page 23 of her brief, Lynnea indicates that Joan could have chosen to "require" James to change the beneficiary designation thereby appearing to acknowledge that there are other remedies available to enforce the life insurance provision, for example, through contempt proceedings.

and attempt to enforce her lien in probate court.

Furthermore, Wisconsin frowns upon limiting remedies. "Although parties may, in their contract, specify a remedy for a breach thereof, that specification does not exclude other legally recognized remedies." *Local 248 U.A.W. v. Natzke,* 36 Wis. 2d 237, 153 N.W.2d 602 (1967) (citing 17 Am. Jur. 2d, Contracts, § 445 at 906). A contract should not be construed to take away a remedy available under the law. *Coleman v. Percy,* 86 Wis. 2d 336, 272 N.W.2d 118 (Ct. App. 1978).[6]

This case is factually similar to *Starleper v. Hamilton,* a case from Maryland which looked to summarize the law in states, which included Wisconsin that imposed constructive trusts as a proper means for enforcing marital settlement agreements. *Starleper v. Hamilton,* 106 Md. App. 632, 666 A.2d 867 (Ct. App. 1995) (citing *Singer by Cohen v. Jones,* 173 Wis. 2d 191, 496 N.W.2d 156 (1992).

In *Starleper,* the parties, Gary and Sharon, had a provision in their MSA that Gary would maintain his insurance policy for the child. *Id.* It also specified that "To the extent that Husband shall fail to comply with the provisions of this Paragraph, his estate shall be charged with the obligations hereinabove assumed." *Id* at 635. Gary named his second wife as the

[6] Nothing in the *Tikalsky* decision indicates that these rules should not be applied to applying the constructive trust doctrine as a remedy for enforcing divorce judgments.

beneficiary, and at the time of his death, Sharon brought an action seeking to have a constructive trust imposed on the insurance proceeds.[7]

The *Starleper* court acknowledged that the specific factual circumstances can vary - the language in the MSAs can differ, as can the nature of the violation by the decedent by naming a different party or allowing the policy to lapse. *Id.* at 640. However the constructive trust is an equitable remedy the court can consider based on the specific circumstances of the case. The *Starleper* court was not convinced by the contention that looking to the estate was the only remedy. It specified that it was not a limiting provision, nor did it preclude any other remedy that might be available to best meet the particular violation. *Id.* at 641.

Finally, 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 by the family court in the divorce judgment; 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 even if the probate court could also have jurisdiction to enforce the

[7] Sharon did not file a claim against the estate in that case because that estate was insolvent, similar to the facts here. *Id.* at 636.

lien. The family court is in a better position to address this issue because the life insurance proceeds passed around the probate court and the probate estate is insufficient to provide the children with complete redress.

2. The lien provision is meaningless if it is the exclusive remedy.

Courts avoid applying provisions in their judgments in a manner that renders them meaningless or defies both common sense and the fundamental purpose of a statute. *Sterr v. Sterr-Macke,* 2015 WI App. ¶10, 346 Wis.2d 758, 869 N.W.2d 170.

The divorce judgment gives the innocent party a lien but that lien would not result in a monetary recovery if the violating party is clever enough to leave no assets that would go through probate court.[8] As the court of appeals and the circuit court pointed out, there were insufficient assets in James' probate estate for the children to recover the life insurance proceeds to which they were entitled. *Pulkkila* at ¶ 9; (App. 119, lines 1-3).

Viewed through this lens, the lien provision as an exclusive provision is meaningless. It would allow, or even encourage, either party to violate the divorce judgment by failing to maintain the required life insurance and then

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[8] Lynnea's argument that the parties provided a "monetary" remedy for violating the divorce judgment misconstrues the provision. (*Resp.-Pet. Brief* at p. 6.) The lien is not actually a remedy. Enforcing the lien does not lead to recovery of money unless there are

directing all of his or her assets around the probate court upon death, leaving nothing for the children to recover. This cannot have been what the parties intended when they negotiated the provision.

Even if Joan had verified the beneficiary designations while James was alive, it would have done her little to no good if she could not institute contempt proceedings to "require" James to change the designations. Rather, Joan would have had to wait for James to die and then rush into probate court in an attempt to enforce the lien. By that time, the life insurance proceeds would be likely have already been paid directly to the improper beneficiaries, as they were in this case, leaving Joan to try to collect the assets from James' estate, if any. This makes no sense. There has to be some alternative remedy available for the lien provision to have any meaning.

Having a lien against the decedent's estate can be a useful tool for enforcing the divorce judgment when the decedent fails to maintain the required insurance for the minor children, if the decedent leaves a sufficient estate that goes through probate. But, in cases where the decedent leaves no probate assets or, as in this case, leaves insufficient probate assets, the provision is meaningless if it is the only remedy available.[9]

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probate assets available to recover.

[9] The instructions for how to use the Family Law In Wisconsin: A Forms and Procedures Handbook, relied upon by Lynnea, specify that "[a]ll forms and letters must be adapted to the particulars of a given case." Supp. App. p. 1. It further cautions users not to be "an idle

3. A constructive trust is still an available remedy even if this court were to decide this case based solely on interpreting the four corners of the MSA.

Even where a contractual remedy is said to be exclusive, Wisconsin law does not require reliance on an exclusive remedy where it fails its essential purpose, *Murray v. Holiday Rambler, Inc.*, 83 Wis. 2d 406, 419–20, 265 N.W.2d 513, 520 (1978) (exclusive remedy can be disregarded in commercial contract and ordinary UCC remedies made available where the limited remedy fails its essential purpose); *Beaudette v. Eau Claire Cty. Sheriff's Dep't*, 2003 WI App 153, ¶¶ 10-11, 265 Wis. 2d 744, 754–56, 668 N.W.2d 133, 138–39 (exclusive grievance and arbitration procedures in collective bargaining agreement can be disregarded where employer's conduct amounts to repudiation of the contract or where employee shows pursuing the remedy would be futile). Thus, even sophisticated parties engaging in commercial transactions under the UCC, or negotiating complex collective bargaining agreements, can look to other remedies where the bargained for remedy is no remedy at all.

Wisconsin Statute 767.01(1) provides similar relief to the parties to a divorce action when a remedy they bargained for fails its essential purpose by allowing the court to address violations of the divorce judgment through equitable remedies.

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form follower." *Id.* p. 2.

The remedy in the life insurance provision in this case has failed in its essential purpose. The essential purpose of that provision was to insure that the parties' minor children would have access to recover the value of the life insurance benefits the parties were ordered to maintain in the event one of the parties violated the divorce judgment and changed their beneficiary designations. James had woefully insufficient assets in his probate estate for the children to recover the life insurance proceeds provided for them in the divorce judgment. As the court of appeals points out, the remedial provision in this case is itself meaningless because James Pulkkila "failed to fund his estate in an amount sufficient to provide the equivalent support for his children." *Pulkkila* at ¶10. Viewing this case purely through the lens of contract interpretation, the same ability to access alternative remedies available to sophisticated commercial and collective bargaining parties under Wisconsin law should be available to Joan in the MSA.

4. The financial support of children of divorced parents takes precedence as a matter of public policy.

Pursuant to Wis. Stat. 809.62(3)(d), the decision by the court of appeals should also be affirmed because of this Court's public policy of providing support for divorced parties' minor children. The paramount goal of child

support is to promote the best interests of the child and to avoid financial hardship for children of divorced parents. *Ondrasek v. Tenneson*, 158 Wis. 2d 690, 695, 462 N.W.2d 915, 917 (Ct. App. 1990). Because the public interest is the welfare of children, the children's best interests transcend an agreement or stipulation of the parties. *Id.*

This Court has repeatedly reinforced this public policy, and substantial case law has developed in the court of appeals as well, all recognizing that a court is empowered to make such orders and modifications to parties' agreements as the best interests of the child may require. *Bliwas v. Bliwas*, 47 Wis.2d 635, 178 N.W.2d 35 (1970). *See also Frisch v. Henrichs*, 2007 WI 102, 304 Wis.2d 1, 736 N.W.2d 85; *Chen v. Warner*, 2005 WI 55, ¶ 47, 280 Wis. 2d 344, 367, 695 N.W.2d 758, 769; *May v. May*, 2012 WI 35, 339 Wis. 2d 626, 813 N.W.2d 179; *Honore v. Honore*, 149 Wis.2d 512, 439 N.W.2d 827 (Ct. App. 1989); *Severson v. Severson*, 71 Wis.2d 382, 238 N.W.2d 116 (1976); *Wood v. Propeck*, 2007 WI App 24, 299 Wis.2d 470, 728 N.W.2d 757; *Krieman v. Goldberg*, 214 Wis.2d 163, 571 N.W.2d 425 (Ct. App. 1997); *Motte v. Motte*, 2007 WI App 111, 300 Wis. 2d 621, 731 N.W.2d 294; *Jalovec v. Jalovec*, 2007 WI App 206, 305 Wis.2d 467, 739 N.W.2d 834.

In *Duahme*, the court specifically noted "the strong equities in favor of the minor children in light of Clyde's unlawful removal of them as primary

beneficiaries, while he was still employed at American Motors." 154 Wis.2d at 268 (emphasis removed).

Had James lived, but not financially supported his children as ordered, the court would have equitable authority to insure that he support his children. These remedies may include the interest on arrears provision set forth in the parties MSA (App. 024) or other equitable remedies to insure compliance.

The life insurance provision at issue was to provide support for the minor children in the event of James' death. The goal for the court is the same – to promote the best interests of the child and to avoid financial hardship for children of divorced parents. *Ondresek,* at 695. Therefore, the court has the same equitable powers to make such orders and modifications, such as a constructive trusts, as the best interest of the children may require, which is what the court of appeals' decision here accomplished.

II. THE COURT OF APPEALS CORRECTLY IMPOSED A CONSTRUCTIVE TRUST.

Imposition of a constructive trust requires a showing of (1) unjust enrichment and (2) actual or constructive fraud, duress, abuse of a confidential relationship, or commission of a wrong or any other form of unconscionable conduct. *Tikalsky* at ¶21.

More specifically, *Tikalsky* sets forth two paths for pursuing a constructive trust. First, a party may directly assert a claim that another party has been unjustly enriched "and that the circumstances by which the unjust enrichment arose satisfy the 'additional showing' described in [*Gorski v. Gorski*, 82 Wis. 2d 248, 254-55, 262 N.W.2d 120 (1978)]" *Id.* at ¶ 23. Second, a party may prove that the other party came into possession of property that was already burdened with a constructive trust." *Id.*

A. The court of appeals' opinion in this case is consistent with the second path by which a person may pursue a constructive trust as outlined in *Tikalsky*.

Tikalsky cites *Richards* as a "good illustration of the situations that call for constructive trusts on property in the hands of innocent beneficiaries." 2019 WI 56 at ¶31.

> Therefore, when Mr. Richards changed the life insurance beneficiary, he was conveying a property interest to his wife that was already freighted with a constructive trust.

Id. The undisputed facts of this case are nearly identical to the facts in *Richards* upon which *Tikalsky* relies.

In both *Richards* and the present case, the husband was subject to a divorce decree that required him to name his minor children as beneficiaries of certain life insurance policies. *Tikalsky*, 2019 WI 56. In both cases the husband named his new wife as the beneficiary in violation of the divorce

decree to the detriment of the children. *Id.* In this case, as in *Richards,* the divorce judgment is to be given the effect of a continuing obligation to carry out the provisions set forth therein. *Id.* As in *Richards,* the insurance proceeds in this case were already burdened by a constructive trust by virtue of the divorce judgment when they fell into Lynnea's hands. *Id.*

B. Lynnea was unjustly enriched when she received the proceeds of the Banner Life Insurance Policy.

The first requirement under *Tikalski* for imposing a constructive trust is a finding of unjust enrichment. *Id.* at ¶21. The unjust enrichment necessary to impose a constructive trust arises "when one party receives a benefit, the retention of which would be unjust as against the other." *Id.* at ¶ 21.

The court of appeals found that Lynnea received and retained a benefit, which was unjust to James' children who were denied their guaranteed means of support. *Pulkkila* at ¶ 10.

Lynnea's discovery responses and her counsel's comments on the record are revealing. Lynnea does not dispute that James incorrectly made her the beneficiary of the life insurance policy. She also does not dispute that she made a claim for the proceeds, or that she, in fact, received and retained the proceeds. This is patently unfair to the Pulkkila children. The trial court in this case expressly stated at the October 20, 2017, hearing, "[i]t's not fair

they're not getting as much money. They lost their father. It is a rotten deal for them." (App. 119, lines 1.3). For Lynnea to receive and retain the insurance proceeds granted to the Pulkkila children under the provisions of the divorce judgment is the very definition of unjust enrichment under *Tikalsky*.

C. James' act of making Lynnea the beneficiary of the policy is unconscionable.

The second requirement for imposing a constructive trust under *Tikalsky* is a showing of actual or constructive fraud, duress, abuse of a confidential relationship, commission of a wrong or any other form of unconscionable conduct. *Id.* at ¶ 21.

The court of appeals found that, "regardless of James' motive, his designation of his new wife to the exclusion of his children was wrong and inequitable under the terms of the MSA." *Pulkkila* at ¶ 10.

In *Richards,* the husband's act of changing the beneficiary designation from his children to his new wife in violation of the divorce decree constituted wrongful conduct and furnished a "proper foundation for the impressing of a constructive trust upon the insurance proceeds which may be followed and recovered . . . ." 58 Wis. 2d at 298-99.

Tikalsky specifically recognizes that "'[A] change of beneficiary in violation of an express provision of a divorce judgment is a sufficient additional factor,' as is 'a change of beneficiary in violation of an express promise supported by consideration ...'" 2019 WI 56 at ¶ 32 (brackets in original).[10]

The terms of the martial settlement agreement require that the proceeds of the policy should have been paid to Brittany and Grace because they were minors at the time of James' death. James failed to make Brittany and Grace the beneficiaries of the policy and instead made Lynnea the beneficiary. James unlawfully bypassed Brittany and Grace as beneficiaries in favor of Lynnea while they were still minors.

This is the same kind of wrongful conduct that was present in *Richards* where the husband bypassed his children in favor of his second wife. In this case, James bypassed his children, Brittany and Grace, in favor of his second wife, Lynnea. Under both *Tikalsky* and *Richards*, James' wrongful conduct in violation of the martial settlement agreement is a proper foundation for imposing a constructive trust on the proceeds from the Banner Life Insurance policy and allowing those proceeds to be followed and recovered from Lynnea. James' actions were not just wrongful, they were contemptuous.

[10] Thus, James act of changing the beneficiary designations is unconscionable whether the court views it as violating the divorce judgment or breaching the MSA.

The Court of Appeals decision to impose a constructive trust should be affirmed.

III. THE COURT OF APPEALS' DECISION IN THIS CASE IS CONSISTENT WITH DUE PROCESS UNDER THE FEDERAL AND STATE CONSTITUTIONS.

A. The court of appeals relied on undisputed facts in imposing a constructive trust.

When facts are undisputed, the question presented to the reviewing court is one of law, which the reviewing court decides without giving special deference to the determinations of the trial court. *First Nat. Leasing Corp. v. City of Madison*, 81 Wis. 2d 205, 208, 260 N.W.2d 251, 253 (1977); *Vill. of Menomonee Falls v. Veierstahler*, 183 Wis. 2d 96, 100–01, 515 N.W.2d 290, 291–92 (Ct. App. 1994); *Affordable Erecting, Inc. v. Neosho Trompler, Inc.*, 2006 WI 67, ¶¶ 20-21, 291 Wis. 2d 259, 269–70, 715 N.W.2d 620, 625.

The court of appeals determined that "[e]quity requires the imposition of a constructive trust" and remanded the case to the circuit court. *Pulkkila*, ¶ 10. The court of appeals' decision, like the petition to this Court, relies on undisputed facts.

It is undisputed in this case that, under the terms of the MSA, James Pulkkila was required to maintain his children as the beneficiaries of his life insurance policies. It is also undisputed that he failed to do so, instead opting

to make his new wife, Lynnea Landsee-Pulkkila, the beneficiary of those policies. Lynnea, through her counsel, freely admitted to the circuit court that James changed the designations in violation of the MSA. The court of appeals relied on these undisputed facts when it imposed a constructive trust:

> All of the requirements of a constructive trust have been satisfied: James' new wife received and retained a benefit which was unjust to James' children who were denied their guaranteed means of support, and the aforementioned unjust enrichment was the result of James' wrongful conduct in violating the MSA.

Pulkkila, ¶ 10. Based on the undisputed facts in the case, no further factual determinations need be made for the court of appeals to determine that imposition of a constructive trust be imposed. Certainly, further hearing may be required to determine the extent of the constructive trust imposed. With respect to the decision to impose a constructive trust, due process has been upheld.

B. The issue of standing was not raised before the court of appeals.

The circuit court confined its decision to whether it had authority to impose a constructive trust. As the court of appeals pointed out, "[i]n this case, the circuit court stated that '[t]he first question I must figure out is whether or not the law allows me to do this. . . . [I]f it gets to a point where the Court does have authority to make an equitable decision on it, if the MSA is not clear, then we will go down that road.'" *Pulkkila*, ¶ 5. The circuit court did

not address the issue of standing. The court of appeals' decision also does not address the issue of standing. The court of appeals simply found that the law permits imposition of a constructive trust under the undisputed facts of this case, and equity requires that a constructive trust be imposed under the same undisputed facts.

CONCLUSION

The Petitioner-Appellant-Respondent, Joan Pulkkila, respectfully requests this court affirm the decision of the court of appeals.

Dated this 31st day of July, 2019

HALLING & CAYO, S.C.

By: _____

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CERTIFICATIONS

I. CERTIFICATION OF COMPLIANCE WITH RULE 809.19(8) 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 monospaced font as modified by the Court's June 11, 2019, Order. The length of this brief is 27 pages.

II. CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12).

I hereby certify that I have submitted an electronic copy of this brief, excluding the supplemental 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 WITH RULE 209.19(3) 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 supplemental 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 31st day of July, 2019.

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