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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 REPLY BRIEF

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I. THE MSA'S REMEDIAL PROVISION RENDERS A CONSTRUCTIVE TRUST UNAVAILABLE.

James and Joan bargained-for and agreed to a remedy that would apply in the event one of them breached the MSA's life-insurance requirement: "a valid and provable lien against his or her estate." (App. 027.) Both of them sought out and anticipated a binding agreement. (App. 032.) The circuit court reviewed their agreement and gave its imprimatur, incorporating the MSA into the final divorce judgment. (App. 014.) Joan's argument that the courts should now, years later, override that express, bargained-for remedial provision contravenes fundamental principles of Wisconsin law. Her position should be rejected.

A. Joan's focus on ambiguity is a red herring.

As an initial matter, Joan's focus on ambiguity fails. She asserts the circuit court believed, in light of *Duhame by Corrigal v. Duhame*, 154 Wis. 2d 258, 453 N.W.2d 149 (Ct. App. 1989), that a finding of ambiguity is an element of

constructive trust. (Resp. Br. at 9-10.) That misrepresents both *Duhame* and the circuit court record.

In *Duhame,* the parties disputed whether the MSA's ambiguous language required the deceased spouse to maintain life insurance at the time of his death. *Duhame,* 154 Wis. 2d at 266. After determining life insurance was required, the *Duhame* court separately considered the elements necessary to impose a constructive trust. *Id.* In this case, the circuit court did not hold, as Joan asserts, that ambiguity was an element of the constructive-trust analysis. Instead, the court considered whether there was any ambiguity about the MSA's exclusive remedy. The court correctly held the MSA unambiguous on this point, foreclosing any recourse to the remedy of constructive trust. (*See, e.g.*, App. 119:4-14 ("I'm not going to step outside of their agreement to provide for other remedies.").)

B. The MSA provides an exclusive remedy.

As the circuit court held, the MSA provides the exclusive remedy for James's breach of the life-insurance requirement. Joan's arguments to the contrary are unavailing.

Joan's attempts to interject uncertainty into the exclusivity of the remedy cannot overcome the text, much less governing law. Joan insists there is no language suggesting the lien remedy is exclusive (Resp. Br. at 11), but ignores that the word "shall" is "construed as mandatory unless a different construction is demanded." *City of Wauwatosa v. Milwaukee Cty.*, 22 Wis. 2d 184, 191, 125 N.W.2d 386 (1963).

Similar arguments have failed in this context. In *Duhame,* the surviving spouse argued both that the MSA required the children to be named as beneficiaries and that it did not require they be the "exclusive" beneficiaries. 154 Wis. 2d at 264. The court rejected that argument, holding that, crediting it would be tantamount to finding that "the parties intended to stipulate to something valueless." *Id* at 265 (quoting *In re Boyd's Estate*, 18 Wis. 2d 379, 381, 118 N.W.2d

705 (1963)). Just as a requirement to make the children beneficiaries can be rendered "valueless" by reading into it the implicit authority to name an unlimited number of additional beneficiaries, so too a remedial provision expressly authorizing a lien against the probate estate would be rendered valueless if, as Joan asserts, it is interpreted merely as one of numerous remedies for breach of the life-insurance requirement. The MSA need not use the magic words "exclusive remedy" to provide precisely that. The intent of the parties governs. *See MS Real Estate Holdings, LLC v. Donald P. Fox Family Tr.*, 2015 WI 49, ¶45, 362 Wis. 2d 258, 864 N.W.2d 83.

Nor does recognizing the exclusivity of the lien remedy after death conflict with the provision allowing either spouse to compel compliance with the life-insurance requirement during life. According to Joan, if a lien against James's probate estate is the exclusive remedy available after his death, it must also have been her exclusive remedy while he was alive. (Resp. Br. at 16.) This is baseless. As the Judgment of Divorce confirms (App. 020) and as Joan acknowledges earlier in her

brief (Resp. Br. at 12), either party's failure to abide by the life-insurance requirement was redressable in contempt proceedings. Now that James is dead, Joan can no longer pursue civil contempt. Before he died, she could not pursue a probate lien. Each remedy was exclusive under certain conditions.

C. The exclusive remedy in the MSA prevents the imposition of a constructive trust.

The parties selected a lien against the estate as their remedy for failure to meet the life-insurance requirement.[1] (App. 027.) As noted below, the parties could have included other remedies, including a constructive trust. (App. 009-010 ¶15 (Hagedorn, J., dissenting).) But they did not do so. "In constructing a contract, 'courts cannot insert what has been omitted or rewrite a contract made by the parties.'" *Columbia Propane, L.P. v. Wis. Gas Co.*, 2003 WI 38, ¶12, 261 Wis. 2d

[1] The court of appeals dismissed the lien remedy as "meaningless" (App. 003 ¶4), but that conclusion was incorrect and premature, as it depends on resolution of factual questions not yet resolved in the circuit court. (*See* Opening Br. at 24-27.)

70, 661 N.W.2d 776 (quoting *Levy v. Levy*, 130 Wis. 2d 523, 533, 388 N.W.2d 170 (1986)).

The fact that the MSA was incorporated into the Judgment of Divorce does not make the MSA any less binding. (Resp. Br. at 11.) Indeed, the opposite is true. *E.g.*, *Bliwas v. Bliwas*, 47 Wis. 2d 635, 639, 178 N.W.2d 35, 37 (1970) (when a court accepts a stipulation in a divorce action, "it does on its own responsibility, and the provisions it sets forth in the judgment are its judgment"). Here, the MSA confirms its own binding nature: "Both parties agree that the provisions of this agreement shall survive any subsequent judgment of divorce and shall have independent legal significance. This agreement is a legally binding contract." (App. 032.)

Further, "a person who agrees that something be included in a family court order, especially where he receives a benefit for so agreeing, is in a poor position to subsequently object to the court's doing what he requested the court to do." *Bliwas,* 47 Wis. 2d at 640. Not only does the MSA contractually bind the parties to their agreement, but its

incorporation into the Judgment of Divorce means that any effort to alter its terms must satisfy the requirements of Wisconsin law governing modification of a judgment. *See* Wis. Stat. § 806.07. Joan cannot—and makes no effort to—satisfy those requirements.

Additionally, crediting Joan's argument would render the MSA meaningless. If, as Joan suggests, a family court has perpetual equitable authority to rewrite the parties' bargain, even after incorporating the MSA into a final judgment, why should divorcing parties negotiate MSAs at all? This cannot be the law, and a review of precedent confirms that it is not.[2]

Joan's reliance on *Franke v. Franke,* 2004 WI 8, 268 Wis. 2d 360, 674 N.W.2d 832, is misplaced. (Resp. Br. at 11.) In citing that case for the proposition that courts have expansive post-judgment equitable authority, she misses several material distinctions. Most glaringly, *Franke*, which

[2] "[A] final division of property is fixed for all time and is not subject to modification." *Winkler v. Winkler*, 2005 WI App 100, ¶15, 282 Wis. 2d 746, 699 N.W.2d 652 (citing *Krieman v. Goldberg*, 214 Wis. 2d 163, 173, 571 N.W.2d 425 (Ct. App. 1997)). *See also* Wis. Stat. § 767.59(1c)(b).

deals with judicial authority to change a confirmed arbitration award, arose from a motion for relief from judgment under Wis. Stat. § 806.07. Here, Joan ostensibly petitions to enforce a judgment, while urging the Court to rewrite that judgment's express terms.

Allowing courts to rewrite MSAs years after incorporating those agreements into final divorce judgments would open a Pandora's Box. Where, as here, parties negotiate remedial provisions to avoid future litigation, the result of proceeding as Joan urges will be the opposite—an open invitation to use litigation as an escape hatch from settled expectations. Allowing courts to circumvent parties' agreements contravenes settled legal principles and creates bad public policy.

Citing *Local 248 UAW. v. Natzke*, 36 Wis. 2d 237, 153 N.W.2d 602 (1967), Joan argues that "Wisconsin frowns upon limiting remedies." (Resp. Br. at 13.) This ignores the Court's more recent holding (cited in Lynnea's opening brief) that, "[w]hen 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. Here, the parties' intent is underscored by the use of mandatory language to set forth the remedy. Using mandatory language in a contractual remedial provision creates an inference that the remedy is exclusive. *Armstrong v. Colletti*, 88 Wis. 2d 148, 154, 276 N.W.2d 364 (Ct. App. 1979).

Joan has no more success with the two cases she cites for the proposition that the law does not require adherence to an exclusive remedy when the remedy "fails its essential purpose." (Resp. Br. at 17.) Those cases, *Murray v. Holiday Rambler, Inc.*, 83 Wis. 2d 406, 265 N.W.2d 513 (1978), and *Beaudette v. Eau Claire Cty. Sheriff's Dep't*, 2003 WI App 153, 265 Wis. 2d 744, 668 N.W.2d 133, involve the Uniform Commercial Code and workers' compensation, respectively. In each instance, the relevant statutory scheme expressly provides alternative remedies where the primary remedy fails. For example, under Wis. Stat. § 402.719(2), "[w]here

circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in chs. 401 to 411." No analogous statutory provision allows the Court to look outside the MSA here.

Finally, Joan's reliance on a Maryland intermediate appellate decision is misplaced. (Resp. Br. at 13 (citing *Starleper v. Hamilton,* 666 A.2d 867 (Md. Ct. Spec. App. 1995)).) *Starleper* centered on the lack of any monetary remedy outside of constructive trust. Because there has been no evidentiary hearing in this case, there is no basis for deeming James's probate estate insolvent. And, without such a finding, *Starleper* is inapposite. In any event, a Maryland ruling does not alter settled principles of Wisconsin law. Under those principles, the MSA should be enforced as written.

II. DUE PROCESS REQUIRES FURTHER CIRCUIT COURT PROCEEDINGS.

Even if the MSA does not foreclose a constructive trust, due process requires further proceedings in the circuit court before imposing such a remedy. *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 ("guarantees of due process [] require that a person must have had a fair opportunity procedurally, substantively and evidentially to pursue the[ir] claim"). Here, because the circuit court found a threshold issue dispositive, it took no testimony about, heard no evidence regarding, and made no rulings on, the competing factual arguments. (App. 119:23-122:6.) 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). 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. 121:1-16.) The court of appeals erred by short-circuiting that process.

Joan asserts both that only three facts are necessary for a constructive trust and that those facts were uncontested below. (Resp. Br. at 26.) She is wrong on both counts. Joan seeks a constructive trust primarily under the second path of *Tikalsky v. Friedman*, 2019 WI 56, 386 Wis. 2d 757, 928

N.W.2d 502. (Resp. Br. at 21-22.) To impose a constructive trust via *Tikalsky*'s second path would require holding that Joan and James's life insurance proceeds were "already burdened with a constructive trust" at the time they signed their MSA and the circuit court entered the Judgment of Divorce. *Tikalsky*, 2019 WI 56, ¶23. Such a ruling would override the express remedial provision that they negotiated and the circuit court approved, leaving that provision as nothing more than surplusage. This the court cannot do.

Tikalsky's first path is similarly foreclosed because it is based on unjust enrichment. As discussed in Lynnea's opening brief, the 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, 265 (Ct. App. 1996). Joan's brief does not address—and therefore concedes—this point. *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp*., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

Nor is Joan correct that key factual issues are undisputed. The circuit court heard only legal arguments from the attorneys as to the impact of the exclusive remedy in the MSA. Lynnea has not been heard on the subject of, and the circuit court has not made findings on, several crucial fact issues. (App. 119:23-122:6.) This includes testimony on the solvency of the probate estate and amounts of other compensation the children received due to James's death.[3] The circuit court has not completely adjudicated the equities. That requires, at minimum, vacating the court of appeals' imposition of a constructive trust and remanding to the circuit court for full, informed consideration of the competing arguments on the merits.

Finally, when Joan asserts that, because of the similarities between this case and others, Lynnea need not have

[3] The court of appeals mischaracterized as undisputed important contested facts, including the total value of James's probate estate. (App. 002-003). The estate's value was contested before the circuit court, which deferred taking testimony and issuing rulings on the subject. (App. 103:7-25, 119:23-122:6.) The court of appeals also ignored statements by Joan's own attorney that she received $60,000 in life insurance proceeds by reason of James's death. (App. 002-003; 082:7-10.)

her day in court, she ignores the fundamental manner in which this case deviates from all of the cases she cites: James and Joan agreed to include an express provision in the MSA anticipating the possibility of breach and specifying the agreed-upon remedy should a breach arise.

III. JOAN LACKS STANDING AND ASSERTED THIS CLAIM INAPPROPRIATELY IN HER DIVORCE ACTION.

From her first filing in this, her deceased husband's prior divorce case, Lynnea has argued that Joan lacks standing to litigate this issue and that the divorce action is not an appropriate forum. (App. 069-074.) Lynnea is not a party to Joan and James's divorce proceeding. (App. 012-033.) The MSA required James to maintain a life insurance policy designating his children—not Joan—as the beneficiaries. (App. 026-027.) Nevertheless, Joan has been allowed—by dint of a simple Motion and over Lynnea's repeated objection—to join Lynnea as a party to the divorce proceeding, to wield the Judgment of Divorce against her, and to seek (contrary to the MSA's express terms) a constructive trust. (App. 034-036.)

The children—both of whom are now adults—are not parties to this action and have made no effort to appear or vindicate their interests. Joan makes no showing as to why she should be allowed to pursue their cause.

"[T]o have standing to sue, a party must have a personal stake in the outcome of the controversy." *Marx v. Morris*, 2019 WI 34, ¶35, 386 Wis. 2d 122, 925 N.W.2d 112 (citing *City of Madison v. Town of Fitchburg*, 112 Wis. 2d 224, 228, 332 N.W.2d 782 (1983)). The "doctrine of standing prohibits a litigant from raising another's legal rights." *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶62, 333 Wis. 2d 402, 797 N.W.2d 789 (quoting *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wash. 2d 107, 138, 744 P.2d 1032, 1055 (1987)). Joan claims to seek a constructive trust "for the benefit of the [] children" (App. 035), but she has not availed herself of any legal mechanism to act on their behalf.

In response to Lynnea's assertion that Joan lacks standing to bring this claim, Joan writes only that the neither the circuit court nor the court of appeals addressed the issue of

standing. (Resp. Br. at 26-27.) To be clear, Joan argues neither waiver nor forfeiture. Her argument makes Lynnea's point and underscores the need for reversal and remand. "When the wrong party litigates a case, we end up resolving disputes that make for bad law." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2322 (2016) (Thomas, J., dissenting).

Joan's unwillingness to acknowledge her lack of standing is understandable. She relies heavily on family law jurisprudence to argue that a constructive trust is available, notwithstanding the MSA's express terms. Indeed Joan's brief opens with an invocation of the judiciary's broad equitable authority in actions affecting the family (Resp. Br. at 6 (citing Wis. Stat. § 767.01)[4]), and she devotes pages to the interests of minor children in divorce (Resp. Br. at 18-20). But her emphases are misplaced. This is not a divorce, and this long-

[4] Wis. Stat. § 767.001(1) delineates the type of actions that qualify as an "action affecting the family." The twelve-item list does not include seeking a constructive trust.

closed divorce action is an inappropriate forum to seek a constructive trust.[5]

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. At minimum, this Court should remand to the circuit court for a full and fair hearing on necessary issues yet to be adjudicated.

Dated: August 12, 2019

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[5] The inappropriate posture of this case is made clear in the very cases Joan relies on to advance her claim. In those cases, the beneficiaries required by the MSA litigated their claims as independent actions against the named beneficiaries. *See, e.g.*, *Richards v. Richards*, 58 Wis. 2d 290, 291-92, 206 N.W.2d 134 (1973) (action brought by decedent's children against second wife); *Duhame*, 154 Wis. 2d at 258 (action brought by guardian ad litem on behalf of children against subsequent wife).

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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 this brief is 2,983 words.

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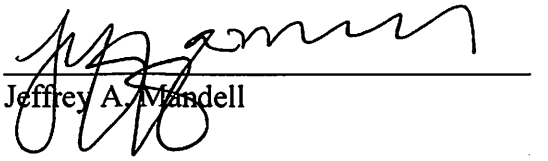

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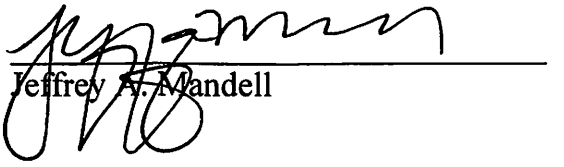

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I hereby certified that I have submitted an electronic copy of this Brief, which complies with the requirement of Wis. Stat. § (Rule) 809.19(12). I further certify that the text of the electronic Brief is identical to the text of the paper copy of 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: August 12, 2019

Jeffrey A. Mandell