

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 2, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 96-1104

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**WILLIAM SCOTT JOHNSON,
PERSONAL REPRESENTATIVE OF THE
ESTATE OF JANET D. JOHNSON,**

PLAINTIFFS-RESPONDENTS,

v.

JEAN A. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Jean A. Johnson appeals from a judgment entered that requires her to return to the estate of her deceased mother, \$140,000 of a \$203,000 pre-death transfer, and allows her to retain \$63,000 in exchange for forfeiting her distributive share of her mother's assets. Jean claims the trial court

erred when it: (1) imposed a constructive trust on the \$140,000 of a \$203,000 transfer made to her by her mother; and (2) held that her retention of the \$63,000 operated as an equitable forfeiture of her one-quarter share of her mother's estate. Because the trial court did not erroneously exercise its discretion in rendering this judgment, we affirm.

I. BACKGROUND

This case arises out of the death of Janet D. Johnson, who died of cancer on March 25, 1994, at the age of 61. She was survived by four children, Janet, Jean, Scott and Elizabeth. Mrs. Johnson lived in Montana from 1980 to 1993, where she was engaged in raising horses on a forty-acre farm. In early 1993, she decided to move back to Wisconsin where her children lived. In August 1993, she sold her farm and in September 1993 moved three horses and a portion of her personal effects to her daughter Janet's farm in Watertown, Wisconsin.

Shortly thereafter, Mrs. Johnson returned to Montana to finalize her affairs. On October 6, 1993, surgery was performed to correct what she believed to be a gall bladder problem, but actually turned out to be a rare form of cancer. She was told that she had, at the most, three months to live. After the surgery, Mrs. Johnson moved fifteen horses and the remainder of her personal belongings to her daughter Janet's farm in Watertown. Mrs. Johnson lived with Janet until Thanksgiving, when a conflict arose between Mrs. Johnson and her son-in-law. As a result, Mrs. Johnson moved in with her daughter Jean, who lived in an apartment in Wauwatosa.

On December 2, 1993, Mrs. Johnson executed a will prepared by her attorney, August Fabyan. The will provided for the payment of her obligations and distributed the residue of her estate in equal shares to her four children. She

also executed a Power of Attorney and Durable Power of Attorney naming her son Scott as her agent and her daughter Jean as alternate agent.

Between November 1993 and February 1994, Mrs. Johnson was in and out of various hospitals for treatment of her medical condition. On February 4, 1994, Mrs. Johnson called her investment broker in Hamilton, Montana, and requested that all of her investments, valuing approximately \$203,000, be transferred to her daughter Jean. The broker, Paul Kink, indicated that he could not effect the transfer over the telephone, but that he would forward the appropriate paperwork. The paperwork was completed and returned to Kink and the transfer was accomplished between March 1 and March 4, 1994.

After Mrs. Johnson's death in April 1994, Scott was appointed personal representative of the estate. The will she signed in December was admitted to probate. Scott inventoried the assets of the estate to be \$226,382.97, which included a claim against Jean to return the \$203,000 that was transferred to her in March 1994. A schedule of unpaid claims against the estate totaled \$46,603.76 consisting primarily of unpaid medical bills and taxes. The amount available in the estate to pay these bills was \$3,710.15. Jean was asked, via deposition on July 16, 1994, whether she was willing to return the funds she received at least to the extent to pay the debts of the estate. Jean testified that she had no intention of returning the funds.

The estate commenced this action against Jean seeking to void the transfer and effect the return of the \$203,000. An advisory jury was impaneled to hear the case. Jean testified that she had spent \$63,000 of the \$203,000 to purchase a small farm, where she was looking after her mother's dogs and horses. After trial, the jury returned a verdict indicating that: (1) the transfer of the

\$203,000 to Jean was not the result of undue influence; (2) Mrs. Johnson was not incompetent at the time of the transfer; (3) Jean breached her fiduciary duty to her mother when she accepted the transfer; and (4) the damages due to the breach were \$140,000.

The trial court subsequently issued findings of fact and conclusions of law. Specifically, it determined that: (1) the transfer was not the result of undue influence; (2) Mrs. Johnson was mentally competent at the time of the transfer; (3) Jean had a confidential and fiduciary relationship with her mother, which she breached by accepting the \$203,000 transfer; (4) such funds were subject to a constructive trust to meet Mrs. Johnson's needs and to fund distributions made in her will; (5) Jean could retain the \$63,000 of the transfer, but had to return the remainder; and (6) Jean's right to share in her mother's estate was forfeited. Judgment was entered and Jean now appeals.

II. DISCUSSION

Jean raises two contentions: (1) that the trial court erred when it imposed a constructive trust upon \$140,000 of the \$203,000 transfer; and (2) that the trial court erred when it held that Jean's retention of the \$63,000 would operate as an equitable forfeiture of her one-quarter share of her mother's estate. We are not persuaded.

Whether to impose a constructive trust in this case is a discretionary determination which this court will not disturb unless the trial court erroneously exercised its discretion. *M&I First Nat'l Bank v. Episcopal Homes Management, Inc.*, 195 Wis.2d 485, 513, 536 N.W.2d 175, 188 (Ct. App. 1995). We will not find an erroneous exercise of discretion if the trial court examined the pertinent facts, applied a proper standard of law and reached a reasonable

conclusion. See *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981). In addition, findings of fact will not be overturned unless they are clearly erroneous. See § 805.17(2), STATS.

A. Constructive Trust.

Jean claims the trial court erroneously exercised its discretion when it imposed a constructive trust. We disagree.

A constructive trust is an equitable device utilized to prevent unjust enrichment.... One seeking a constructive trust must establish the elements of unjust enrichment and also that the benefit to the other party was obtained or retained by means of actual or constructive fraud, duress, abuse of a confidential relationship, mistake, commission of a wrong or other unconscionable conduct.... A constructive trust, being equitable in nature, may be used in a variety of situations, sometimes to develop a new field of equitable interposition.

M&I First Nat'l Bank, 195 Wis.2d at 512, 536 N.W.2d at 188 (citations omitted).

The trial court concluded that the \$203,000 transfer was subject to a constructive trust in order to meet Mrs. Johnson's needs and to fund distributions made in her will. The trial court based this conclusion on several findings of fact: a fiduciary and confidential relationship existed between Jean and her mother, Jean breached her fiduciary obligation under that relationship, and Jean was unjustly enriched by the transfer. We cannot conclude that these findings are clearly erroneous. Jean was caring for her terminally ill mother; she assisted her mother in handling personal affairs; she had the alternate power of attorney and was the alternate personal representative. These facts, together with the family relationship, are sufficient to support the trial court's finding that a confidential or fiduciary relationship existed. See *Meyer v. Ludwig*, 65 Wis.2d 280, 287, 222 N.W.2d 679, 683 (1974).

The record also supports the trial court's finding that this duty was breached. Mrs. Johnson's will stated that her bills were to be paid and the residue of the estate was to be divided equally amongst her four children. Jean did not safeguard her mother's funds to accomplish this purpose; instead, she appropriated these funds for her own use. Even upon learning that the estate had bills totaling \$47,000, Jean refused to return any of the funds to the estate.

Finally, there is evidence to support the trial court's finding that Jean was unjustly enriched at the estate's expense. Jean appropriated money for her own personal use while her mother's estate could not satisfy debts and obligations. The trial court found that Jean should have preserved her mother's funds to meet the requirements of her will, both to pay for debts/obligations and to fund the residuary clause of the will. In other words, Jean was not supposed to keep the \$203,000 for herself.¹ Rather, Mrs. Johnson wanted the money to be used to cover any expenses and to be shared equally amongst her four children.

Accordingly, we cannot conclude that the trial court's findings are clearly erroneous. The factual findings support the legal conclusions and the trial court reached a reasonable determination. Therefore, the trial court did not erroneously exercise its discretion in imposing the constructive trust and requiring the return of the \$140,000.

¹ The trial court seemed to infer from the facts that Mrs. Johnson made the transfer in an effort to fraudulently gain Title 19 eligibility, rather than to gift her entire estate to one daughter. The record demonstrates that on February 24, 1994, Mrs. Johnson signed a Title 19 application stating that she had no assets and had transferred no assets within the past thirty-six months. Jean witnessed her mother's signature on this form.

B. Forfeiture of Inheritance.

Jean also claims that the trial court erred when it held that Jean's retention of the \$63,000, which she had already expended to purchase a farm to care for her mother's animals, operated as an equitable forfeiture of her share of the residuary pursuant to the will. Jean argues for the first time on appeal that the trial court did not have the authority to forfeit her interest under the will.

This case presents an unusual factual situation. We have already concluded that the trial court did not erroneously exercise its discretion in imposing a constructive trust. As a part of fashioning an equitable remedy, the trial court also determined that Jean would not have to return the \$63,000, which she had already expended to purchase the farm, machinery and other items to take care of her mother's animals. The trial court held that because Jean was allowed to retain this amount, it would not be equitable to include Jean in the division of the residuary of the \$140,000 (after paying expenses). Jean's retention of the \$63,000 gives her approximately twice as much as the other three children's inheritances. The trial court concluded that under the facts and circumstances, the distribution of the assets would only be equitable if Jean forfeited her share of the residuary. Under the unique factual scenario here, we cannot say that the trial court was without authority to effect this equitable remedy.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

