COURT OF APPEALS
DECISION
DATED AND RELEASED

July 17, 1997

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.

NOTICE

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

Nos. 96-3504 & 96-3505

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE ESTATE OF KIETH M. FERRIES, DECEASED:
ESTATE OF KIETH M. FERRIES,

APPELLANT,

V.

GERALD W. LAABS, GUARDIAN AD LITEM FOR
EMILY FERRIES AND MICHELLE FERRIES, MINORS,
AND SHARON FERRIES,

RESPONDENTS.

--

IN RE THE MARRIAGE OF:
SHARON FERRIES,

PETITIONER-RESPONDENT,

V.

KIETH M. FERRIES,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Jackson County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

EICH, C.J. In 1994, four years after his divorce from Sharon Ferries, Kieth Ferries discovered that a $100,000 insurance policy on his life—and payable to his estate—had not lapsed for nonpayment of premiums, as he had assumed at the time of the divorce. He died shortly after making the discovery, and his will, which was executed after he learned the policy was still in effect, made several individual bequests and then left "[a]ll of the rest and rem[a]inder of the assets" in trust, to be divided equally among his and Sharon's two minor daughters and his two adult sons from a prior marriage.

The daughters, through their guardian ad litem, filed a claim with Kieth's estate for the $100,000 policy proceeds, and Sharon moved to reopen the 1990 divorce proceedings on the basis of the "newly-discovered evidence" of the policy's effectiveness. The trial court granted Sharon's motion and consolidated the divorce case with the ongoing probate proceedings. The facts were stipulated and the issues were decided on the parties' briefs. The daughters' guardian ad litem urged the court to impose a constructive trust for their benefit on the policy proceeds, and Sharon sought recovery of approximately $9300 in delinquent child support. The estate argued that a constructive trust was improper because the minor children would receive more from the estate than Kieth's adult sons.

The trial court approved Sharon's child-support claim and imposed a constructive trust on the policy proceeds, directing that they be held for the benefit of Sharon and Kieth's two minor daughters.[1]

Kieth's estate appeals on behalf of his two adult children, renewing its argument that the trial court lacked authority to impose a constructive trust on the insurance proceeds. Alternatively, the estate argues that it was error (1) to place the entire proceeds of the policy in trust—that the trust should be limited to the policy's cash surrender value of $2556.91; and (2) to name only the minor children as beneficiaries, excluding Kieth's adult sons from his prior marriage. We reject both the principal and the alternative arguments and affirm the court's decision and order.

I. Authority to Establish a Constructive Trust

Section 767.27(5), STATS., authorizes the family court to impose a constructive trust on assets that either party "deliberately or negligently fails to disclose" in the divorce proceedings.[2] The trial court found as a fact that Kieth did

[1] The estate does not challenge either the trial court's award of back child support to Sharon or its reopening of the divorce case.

[2] The statute, after requiring in subsection (1) that parties to a divorce proceeding fully disclose all "assets"—specifically including "life insurance"—provides:

> (5) If any party deliberately or negligently fails to disclose information required by [statute] and in consequence thereof any asset or assets with a fair market value of $500 or more is omitted from the final distribution of property, the party aggrieved by such nondisclosure may at any time petition the court granting the … divorce … to declare the creation of a constructive trust as to all undisclosed assets, for the benefit of the parties and their minor or dependent children … said trust to include such terms and conditions as the court may determine. The court shall grant the petition upon a finding of a failure to disclose such assets ….

Section 767.27(5), STATS.

not disclose the policy, which, according to the court, had been acquired during the parties' marriage, and that "[n]either party was aware that the … policy had not lapsed and was still in force and effect." The court said that the only reasonable inference from the undisputed facts is that Kieth had assumed that the policy had lapsed after he ceased paying premiums in 1989, and that, "unbeknownst to him, the policy remained in full force and effect as the insurance company paid the premiums from the [policy's] cash surrender value." From this, the court concluded: "Kieth's failure to be aware of and disclose the existence of the policy at the time of [the] divorce was negligence."

The estate begins by disputing the court's determination that Kieth's failure to disclose the policy was "negligent" within the meaning of § 767.27(5), STATS. Focusing on the trial court's statement that, at the time of the divorce, neither Sharon nor Kieth was "aware that the … policy had not lapsed and was still in full force and effect," the estate argues that this is not a case of Kieth's negligence but one of "mutual mistake." It does not explain the argument further, other than to state that "the trial court's assertion of mistake as a basis for imposition of a constructive trust is inappropriate."

But what is negligence, in the sense it is used in § 767.27(5), STATS., if not a mistake? Webster defines "negligent" as, among other things, implying "inattention to one's duty or business" or "marked by a carelessly easy manner." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 791 (1991). To Black, negligence is "[t]he omission to do something which a reasonable [person], guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent [person] would not do." BLACK'S LAW DICTIONARY 1032 (6th ed. 1990). The latter is simply another way of stating the Wisconsin definition, which is a failure to exercise ordinary

care—"that degree of care which the great mass of [human]kind, or the ordinarily prudent [person] exercises under like or similar circumstances." WIS J I–CIVIL 1001 (1992).

The policy insured Kieth's life. It was obtained—during his marriage to Sharon—in connection with a business he was operating, and the premiums were automatically paid by the business. Having sold the business shortly before the divorce, Kieth simply assumed that the policy lapsed when the next-due premium was not paid. Had he checked, he would have realized that, under the policy's terms, premiums would continue to be paid from the policy's cash value and that the policy was still in effect at the time of the divorce. Under any commonly accepted definition of the term "negligence," lay or legal, we think the trial court could, as it did here, properly determine that Kieth was negligent in failing to realize or ascertain the policy's continued effectiveness and report it as an asset in the divorce proceedings as the law required him to do. We thus reject the estate's argument that the court lacked authority to impose a constructive trust on the policy proceeds.

II. The Amount of the Trust

The estate next argues that, if we uphold the trial court's establishment of the trust, it should be in the sum of only $2556.91, which it claims was the policy's cash surrender value when Kieth and Sharon divorced in 1990. The estate reasons as follows: (1) because, under § 767.27(5), STATS., a constructive trust may be imposed if, as a result of a party's negligent or deliberate failure to disclose property, any asset "with a fair market value of $500 or more" is omitted from the property distribution, and (2) because the fair market value of an

insurance policy is its cash surrender value, it follows that any trust must be limited to that amount.

We begin by noting that the estate failed to offer any authority for one of its argument's major premises: "until the death of the insured, the only value of a life insurance policy is its cash surrender value." We have often stated that we do not consider arguments unsupported by references to legal authority. *See* ***Phillips v. Wisconsin Personnel Comm'n***, 167 Wis.2d 205, 228, 482 N.W.2d 121, 130 (Ct. App. 1992).

Sharon, on the other hand, cites and discusses several Wisconsin cases in which both we and the supreme court approved the imposition of constructive trusts on the proceeds of life insurance policies. *See*, *e.g.*, ***Richards v. Richards,*** 58 Wis.2d 290, 298-99, 206 N.W.2d 134, 138 (1973); ***Singer v. Jones,*** 173 Wis.2d 191, 198, 496 N.W.2d 156, 159 (Ct. App. 1992); ***Duhame v. Duhame,*** 154 Wis.2d 258, 261, 268-69, 453 N.W.2d 149, 150, 153 (Ct. App. 1989).

The estate does not respond to these citations, other than to state generally that they are distinguishable because in each instance the trust was imposed because one of the parties had violated a temporary order or judgment. Here, of course, the trust was imposed under § 767.27(5), STATS., because Kieth negligently violated the asset-reporting statute, § 767.27(1). We fail to see the distinction between violation of a court order and violation of a statute. The estate is correct in noting that ***Richards***, ***Singer*** and ***Duhame*** all deal with "equitable" or common-law trusts. But its argument is that, while violation of a temporary order or judgment may justify imposition of a constructive trust, violation of a statute does not, and we are not persuaded that such a distinction is either desirable or supported by the law.

III. Naming Only the Minor Children as Trust Beneficiaries

Finally, the estate argues that the trial court erroneously exercised its discretion in establishing the trust by failing to include Kieth's adult sons as equal beneficiaries. It bases its argument on the language in § 767.27(5), STATS., which provides that, when the statutory conditions are met—as we held they were in this case—the court is to declare a constructive trust as to all undisclosed assets "for the benefit of *the parties* and their minor or dependent children." (Emphasis added.) Characterizing the italicized language as requiring any trust created under the statute to be for the benefit of both Sharon and Kieth (and the minor children), the estate argues that the trial court deliberately and improperly ignored Kieth's wish, as expressed in his will, that his adult children share in his estate.[3] Thus, says the estate, the trust did not "benefit" him and is therefore void.

The estate first contends that the trial court improperly failed to consider "all relevant factors" in setting up the trust because it limited its consideration to facts in existence at the time of the divorce, rather than "considering the factual situation in effect at the time of Kieth's death." Rather than supporting the argument with citations to applicable legal authority, the estate instead posits various "scenarios" purporting to show what the minor and adult children would have received under differing factual situations. The import of these scenarios may be summarized by the estate's assertion that: (1) had the $100,000 policy been added to the other $40,000 in Kieth's estate and divided

---

[3] The estate characterizes the trial court's decision as holding that "Sharon and the [minor] daughters are the only persons who should have an interest" in the trust. As Sharon points out, however, she is not a continuing beneficiary of the trust. The court ordered only that she be reimbursed for $9300 in delinquent child support from the proceeds of the insurance policy.

equally among the four children, the two minor children would have received half of the total and the two adult children would have received the other half; and (2) by limiting the trust to the two minor children, as the trial court's decision mandates, they will receive one hundred percent of the $100,000 policy and half of the remaining $40,000, while the adult children will receive only half of $40,000. According to the estate, this "unjustly enriches" the two minor children. We disagree.

As to the estate's argument that the trial court failed to consider all relevant factors, we note first that the case was submitted to the trial court on a fairly brief set of stipulated facts, and there is no indication that the court "ignored"—deliberately or otherwise—any of them. Second, when we review a discretionary decision, such as one creating a constructive trust, we do not test that decision by some subjective standard, or even by our own sense of what might be a "right" or "wrong" decision in the case; rather, the decision will stand unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion. ***State v. Jeske***, 197 Wis.2d 905, 913, 541 N.W.2d 225, 228 (Ct. App. 1995). Indeed, as we have often said, "we generally look for reasons to sustain discretionary decisions." ***Burkes v. Hales***, 165 Wis.2d 585, 591, 478 N.W.2d 37, 39 (Ct. App. 1991) (quotations and quoted sources omitted).

In its written decision, the trial court emphasized the following factors: (1) at the time of the divorce, the parties had only modest incomes and only "meager" insurance on Kieth's life, which they agreed to maintain for the benefit of their two minor daughters;[4] (2) the later-discovered $100,000 policy had been

[4] The parties' stipulation required Kieth to maintain the existing insurance, "with the parties' minor children named as sole and irrevocable primary beneficiaries until the youngest minor child reaches the age of majority…."

acquired during Kieth's and Sharon's marriage and maintained with marital assets; (3) if Kieth had disclosed the policy at the time of the divorce, it is "most …. likely that the parties would have agreed to require Kieth to maintain the policy for the benefit of the [minor] children"; and (4) even if they had not so agreed, "it is almost certain that the … court would have ordered that Kieth maintain the policy and name the [minor] children as the beneficiaries, thereby providing some protection against his death before the[y] … became adults."

There is no question that the trial court, upon learning of the undisclosed policy, had authority to reopen the divorce proceedings; indeed, as we noted, the estate does not contest that proposition. What the estate urges upon us is the proposition that, when Keith became aware that he had negligently failed to disclose the life insurance policy in his divorce proceedings as required by law and redrew his will, he barred the court from exercising the discretion committed to it by the law to correct that error. Divorce courts routinely direct parties responsible for paying child support to maintain life insurance policies for the children's benefit during their minority—for the obvious purpose of ensuring continuation of support should the payor die before the children reach adulthood. Indeed, Kieth agreed to do just that with the "meager" insurance he did disclose in the 1990 divorce proceedings. The estate stresses that the "newly-discovered" policy was for a much more substantial sum, but we do not see why that fact alone should bar the court from imposing a similar requirement in the reopened proceedings. Nor has the estate cited us to any cases suggesting the existence of a legal bar to such a decision. We are satisfied that the trial court could, and did in this case, properly exercise its discretion to secure Kieth's support obligation with the policy in question.

Finally, we disagree with the estate's argument that such a decision runs contrary to the "benefit of the parties and their minor … children" language of

§ 767.27(5), STATS. Securing a parent's moral and legal obligation to support his or her children during their minority may be said to benefit both parent and child. Both will be secure in the knowledge that provision has been made for the minor children's necessary support in the event of a parent's death.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.