STATE OF MICHIGAN

COURT OF APPEALS

EULA PERRY,

Plaintiff-Appellant,

v

STEPHANIE INEZ BANKSTON,

Defendant-Appellee.

UNPUBLISHED
May 13, 1997

No. 180018
Oakland Circuit Court
LC No. 93-460992-CZ

Before: Markey, P.J., and McDonald and M.J. Talbot,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order requiring that the proceeds from an insurance policy be placed in trust with defendant Stephanie Inez Bankston as trustee. The court ordered the trust created for the benefit of Brandon Jordan, the son of defendant and Michael Jordan, who is now deceased. Plaintiff is the decedent's mother and Brandon's paternal grandmother. We affirm.

The trial court aptly summarized the facts of this case as follows in its October 11, 1994 final order and judgment:

> On November 4, 1987, Michael Jordan took out the insurance policy in question. Plaintiff, Michael Jordan's mother, is the stated beneficiary in the application of insurance. Both parties agree that while no one is named as the beneficiary in the insurance policy . . . the policy states the beneficiary named in the application shall receive the life insurance proceeds, and thus Defendant concedes that Plaintiff is the only stated beneficiary. However, because of testimony which will be cited below, Defendant contends that Michael Jordan's son, Brandon, was the intended beneficiary.
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> William Young, the insurance agent who sold the policy, testified that Michael Jordan stated, when making out the application, that he wanted Brandon to be the

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* Circuit judge, sitting on the Court of Appeals by assignment.

beneficiary. Mr. Young recommended a trust be created for Brandon so that the proceeds would go into the trust when Michael Jordan died, and therefore no probating would be required. In the meantime, Mr. Young recommended Plaintiff be named as beneficiary, rather than Brandon's mother, Stephanie Inez Bankston (the defendant), because Michael Jordan and Stephanie were not married and the insurance company would have objected to her being named. Mr. Young clearly testified that the purpose of taking out the policy was that if anything happened to Michael Jordan, his child would be taken care of. He also testified that the death benefit was to go to Brandon if Michael Jordan died before a trust was set up, and that was why Eula was named as beneficiary.

On October 20, 1992, Michael Jordan died without creating a trust. Although plaintiff raises several issues on appeal, the dispositive issue is whether the great weight of the evidence supported the trial court's decision to establish a parol trust in favor of Brandon. We find sufficient evidence to form a constructive trust and affirm the court's decision, albeit reached for the wrong reason. See *Welch v District Court*, 215 Mich App 253, 256; 545 NW2d 15 (1996).

Plaintiff asserts that the trial court's decision was against the great weight of the evidence. We disagree. First, plaintiff failed to move for a new trial, so this issue is unpreserved on appeal. *Brown v Swartz Creek Memorial Post 3720--VFW Inc,* 214 Mich App 15, 27; 542 NW2d 588 (1995); *Buckeye Marketers, Inc v Finishing Services, Inc,* 213 Mich App 615, 616-617; 540 NW2d 757 (1995). Even assuming, arguendo, that plaintiff properly preserved this claim, we believe that the overwhelming weight of the evidence did not favor plaintiff, so no manifest injustice would result in the absence of appellate review. *Buckeye Marketers, supra* at 617; *Bordeaux v The Celotex Corp*, 203 Mich App 158, 171; 511 NW2d 899 (1993).

I

First, with respect to the admission of parol evidence regarding Michael Jordan's intent in purchasing the insurance, this Court will not disturb the trial court's decision to admit evidence absent an abuse of discretion, i.e., where the court's ruling has no basis in law or fact. *Price v Long Realty, Inc,* 199 Mich App 461, 466; 502 NW2d 337 (1993); *Green v Jerome-Duncan Ford,* 195 Mich App 493, 498; 491 NW2d 243 (1992). According to the parol evidence rule, parol evidence is not admissible to vary the terms of a clear and unambiguous contract but it is admissible to show, preliminarily, whether the parties intended the written instrument to be a complete expression of their agreement. Parole evidence is admissible, however, to establish the existence of an agreement underlying a constructive trust. See *Arndt v Vos*, 83 Mich App 484, 488; 268 NW2d 693 (1978). Thus, extrinsic evidence of prior or contemporaneous agreements or negotiations is admissible because it bears on the threshold question of whether the written instrument, i.e., the insurance contract, is an integrated agreement, *Vergote v K Mart Corp (After Remand)*, 158 Mich App 96, 108; 404 NW2d 711 (1987); *Central Transport, Inc v Fruehauf Corp*, 139 Mich App 536, 544; 362 NW2d 823 (1984), and on the existence of the constructive trust based upon an oral agreement, *Arndt, supra*.

Although Michael Jordan's insurance contract naming plaintiff as the only beneficiary appears clear and unambiguous on its face, Young's and defendant's testimony regarding Michael Jordan's state of mind when purchasing the insurance[1] was admissible both under MRE 803(3) and as evidence that Jordan did not intend the insurance contract to be a complete expression of the agreement as to who was to be the ultimate beneficiary of Jordan's and defendant's life insurance proceeds. *In re Skotzke Estate,* 216 Mich App 247, 251-252; 548 NW2d 695 (1996); *Vergote, supra.*

II

Generally, a trust is created only if the settlor manifests an intent to create a trust and there exists an explicit declaration of trust accompanied by a transfer of property to one for the benefit of another. *Osius, supra;* see also *Pierowich v Metropolitan Life Ins Co*, 282 Mich 118, 121-122; 275 NW 789 (1937). In this case, however, we find no indication that Michael Jordan or defendant told plaintiff that Michael, by naming her as beneficiary of his life insurance policy, was creating a property interest in her name for the benefit of his son. Accordingly, we cannot agree with the trial court that an express trust existed.

Nevertheless, we find upon de novo review that sufficient evidence exited to impose a constructive trust on the life insurance policy proceeds in Brandon's favor because "such trust is necessary to do equity or prevent unjust enrichment . . . ." *Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176, 188; 504 NW2d 635 (1993), citing *Ooley v Collins*, 344 Mich 148, 158; 73 NW2d 464 (1955); *Children of the Chippewa, Ottawa and Potawatomy Tribes v The Regents of the University of Michigan*, 104 Mich App 482, 487; 305 NW2d 522 (1981).[2] As our Supreme Court stated in *Kammer Asphalt, supra*:

> A constructive trust . . . may be imposed when property "'has been obtained through fraud, misrepresentation, concealment, undue influence, duress, taking advantage of one's weakness, or necessities, or any other similar circumstances which render it unconscionable for the holder of the legal title to retain and enjoy the property . . . '." Accordingly, it may not be imposed upon parties "who have in no way contributed to the reasons for imposing a constructive trust." The burden of proof is upon the person seeking the imposition of such a trust. [Citations omitted.]

In *Kent v Klein*, 352 Mich 652, 654-656; 91 NW2d 11 (1958), our Supreme Court affirmed the existence of a constructive trust where a parent deeded property to her children and placed her daughter's name on the deed granting property to the daughter's mentally incompetent brother John, although the daughter was never informed about the arrangement and another brother held the deed. After John died, the sister refused to deed the property to John's wife and son, arguing that she made no promise to hold the property in trust and that such a promise was unenforceable under the statute of frauds. *Id.* at 655-656. In eloquent terms that apply with equal force to plaintiff, who stands in the identical shoes of the defendant-daughter in *Kent, supra*, our Supreme Court observed:

It is possible that defendant's self-interest has distorted her objectivity. She holds this land not merely because John was her brother but because, in addition, he was her incompetent brother. She holds this land because her mother implicitly trusted her honor, her integrity, and her familial solicitude. *A bond the mother demanded not, nor writing, nor, indeed, a promise. Foolish it may have been for her to have trusted so blindly,* but it lies ill in the mouth of the honored child to assert selfish advantage therefrom. The sister's cupidity in seeking a double portion at the expense of her incompetent brother gains nothing in either justification or luster by ranging it alongside a mother's possibly foolish trust or, indeed, blind gullibility. Trust and confidence there was, in abundant measure. *What was clear to the trial chancellor (that the land was intended for John) is equally clear to us and, as far as the sister is concerned, chancery will not permit one to enrich himself at the expense of another by closing its eyes to what is clear to the rest of mankind. Equity, to paraphrase, regards that as seen which ought to be seen, and, having so seen, as done that which ought to be done.*

* * *

What is overlooked in all of this is the fact that the constructive trust is not a trust at all, any more than a quasi-contract is a contract. Both are remedial devices. The constructive trust, as it was put by Mr. Justice Cardozo, "is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not , in good conscience, retain the beneficial interest, equity converts him into a trustee." It arises by operation of law. *That defendant made no promise to hold in trust is utterly irrelevant.* The constructive trust is as contemptuous of promises not made as of promises broken. . . . Fraud in the inception we do not require, nor deceit, nor chicanery in any of its varied guises, *for it is not necessary that property be wrongfully acquired. It is enough that it be unconscionably withheld. . . .*

It is enough, to compel the surrender, that one feed and grow fat on that which in good conscience belongs to another, that he enjoy a windfall resulting in his unjust enrichment, that he reap a profit in a situation where honor itself furnishes rich reward, where profit, the mainspring of the market place, is both foreign and inimical to the trust reposed. These principles have been firmly established in this jurisdiction for many years and we do not propose to depart therefrom. [*Id.* at 655-657; emphasis added; citations omitted.]

See also *Stephenson v Golden*, 279 Mich 493; 272 NW 881 (1937), on rehearing 279 Mich 710, 740-741; 279 NW 710 (1937).

Here, Young as well as defendant testified at trial that the purpose behind defendant's and Michael Jordan's purchase of separate life insurance policies naming their respective mothers as the

beneficiaries was to provide for their son, Brandon, in the event that anything happened to either parent.[3] Presumably, Young's testimony, as an independent witness, was particularly helpful, so even though Michael Jordan did not create the trust for Brandon as Young had instructed, the trial court found this testimony to be clear and satisfactory evidence of Michael Jordan's intention in purchasing the insurance. *Pierowich, supra* at 120-122; *Martin, supra*. We find no basis for overturning this conclusion. Moreover, the court found plaintiff's testimony to be equivocal[4] and less credible than defendant's testimony, and we defer to the trial court's superior ability to view the evidence and evaluate witness credibility. *Buckeye Marketers, supra; Bordeaux, supra* at 171. We will not, therefore, second guess the trial court's evaluation of the testimony.

Furthermore, plaintiff's testimony regarding why she was named as beneficiary in Michael Jordan's life insurance policy was equivocal at best. Defendant's and Young's testimony compelled the conclusion, as in *Kent, supra*, that Michael trusted, without seeking his mother's prior approval, promise, or written statement, that his mother would do the right thing and give the insurance proceeds to Brandon as he and defendant had intended. We are convinced, as was the trial court, that although plaintiff did not wrongfully acquire the insurance proceeds, she "unconscionably withheld" them from Brandon, her grandson. *Kent, supra* at 657. Plaintiff will, indeed, "enjoy a windfall resulting in [her] unjust enrichment, [and] reap a profit in a situation where honor itself furnishes rich reward" should plaintiff be permitted to retain the life insurance proceeds. Thus, "whenever the circumstances under which property was acquired make it inequitable that [the property] should be retained by him who holds the legal title," and "equity regards and treats as done what in good conscience ought to be done," the remedial device of a constructive trust may be employed "to prevent a failure of justice." *Id.* at 657-658, citing *Weir v Union Trust Co*, 188 Mich 452, 463; 154 NW 357 (1915). We find that a constructive trust is warranted here to prevent such a failure of justice. Because the court sitting in equity may order whatever conveyance will remedy the injustice giving rise to the constructive trust, *id.* at 658, the trial court properly granted, albeit for a different reason, defendant's request that the proceeds of Michael Jordan's life insurance proceeds be held in trust with defendant for Brandon's benefit. Accordingly, we find no abuse of discretion in the admission of Young's and defendant's testimony at trial, and we find that the overwhelming weight of the evidence supports the creation of a constructive trust in Brandon's favor. Given our resolution of these issues, we find no need to address the other issues that plaintiff raises on appeal.

Affirmed. Defendant being the prevailing party, she may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ Gary R. McDonald
/s/ Michael J. Talbot

[1] Defendant testified that she paid the premiums on both policies and had physical possession of the policies.

[2] "[W]e may not reverse or modify a factual decision reached in an equity matter unless we are convinced that we would have reached a different result had we occupied the position of the trier of fact." *Id.* We are convinced that we would have ordered the proceeds from the insurance policy to be placed in trust with defendant for the benefit of Brandon but not due to the existence of a parol trust. Thus, we may modify the trial court's factual decision in this equity case. *Id*

[3] Defendant and Young testified that defendant and Jordan also purchased a third policy where Brandon was the named insured.

[4] Plaintiff testified that she did not discuss the policy with Michael Jordan but later testified that her son said he made her the beneficiary in order to take care of her. When asked again, plaintiff could not remember whether Jordan said that he intended the proceeds to benefit her.