STATE OF MICHIGAN

COURT OF APPEALS

GARLAND RUSSELL QUEEN,

Petitioner-Appellant/Cross-Appellee,

v

CHARLOTTE QUEEN, LAURINDA QUEEN BURLESON, AND MEL E. QUEEN,

Respondents-Appellees/Cross-Appellants.

UNPUBLISHED
March 6, 1998

No. 190762
Berrien Probate Court
LC No. 93-001023 IE

Before: Griffin, P.J., and Holbrook and Neff, JJ.

PER CURIAM.

Following a two-day bench trial, the Berrien County Probate Court invoked the equitable remedy of constructive trust, ordering that the assets of decedent Flora Queen be distributed in accordance with her intent. Petitioner appeals as of right from the order and respondents cross-appeal by right. We affirm in part and reverse in part.

The present case concerns the estate of Flora Queen, who died on November 26, 1993, at the age of eighty-nine. Flora was married to Everett Queen, Sr., who died in 1978. The decedent and Everett Queen, Sr., had two sons, Garland Russell Queen (Russell), the petitioner in this case, and Everett Queen, Jr. (Everett), who predeceased his mother on September 9, 1993. Everett was survived by his wife, Charlotte Queen, and his two children, Mel Queen and Laurinda Queen Burleson, respondents herein. Flora's will, dated June 3, 1976, left the residue of her estate to her husband. However, in the event that he predeceased her, she provided that the residue was to be divided equally between her two sons, Everett and Russell. Flora named Russell as the executor of her estate. The dispute in this case concerns various assets that passed outside of Flora's probate estate. The following assets are at issue: (1) Michigan properties including Flora's homestead and adjoining barber shop, three rental properties, and a farm, all held by Flora, Everett, and Russell as joint tenants with the right of survivorship, (2) four life insurance policies, from which Russell received the proceeds, (3) a Sun Life annuity, which names Everett and Charlotte as beneficiaries, (4) two First Interstate joint bank accounts, with the named account holders being Flora, Everett, and Charlotte, and (5) a 240-acre parcel of vacant desert land in Arizona, titled in the names of Everett and Charlotte.

Petitioner contended in probate court that he was the legal owner of the Michigan properties and should be permitted to retain full ownership of the real estate. However, petitioner also believed that he was entitled to a one-half interest in the bank accounts, the annuity, and the Arizona land. Petitioner maintained that all of the assets listed above should be divided equally between himself (fifty percent) and Everett's heirs (fifty percent).

At the conclusion of the two-day trial, the probate court issued its findings of fact and conclusions of law. The court found that the decedent had two testamentary goals: (1) to treat her sons equally in the disposition of her estate, and (2) to make certain that her assets avoided probate. The court found that the decedent accomplished those objectives by titling her property in joint tenancy with right of survivorship between herself and her two sons whenever possible, trusting that each of her sons would "do right by the other" in sharing those assets equally with his brother. The probate court further found, with regard to the issue of testamentary intent, that when the decedent spoke of "her sons," she meant that term to include each of her sons or the children of a son who predeceased her.

Pursuant to this perceived intent, the court ordered that the First Interstate Bank accounts and the Sun Life annuity were assets of the estate and would be administered pursuant to the terms of the will. The court further ordered that the Michigan realty and the four life insurance policies be placed in constructive trust equally benefiting petitioner and the issue of Everett. Petitioner was ordered to serve as the constructive trustee. In addition, the probate court disallowed payment of the $600 fee of petitioner's handwriting expert out of the estate assets.

On appeal, petitioner first contends that the probate court erred by placing the Michigan real estate and the insurance proceeds in a constructive trust where there was no evidence of wrongdoing on the part of petitioner and no confidential relationship existed between petitioner and the decedent through which she expressed her intent regarding the disposition of the assets held in trust.

Constructive trust is an equitable remedy which arises not by virtue of agreement or intention, but by operation of law. *In re Swantek Estate*, 172 Mich App 509, 517; 432 NW2d 307 (1988). Its imposition makes the holder of legal title the trustee for the benefit of another who in good conscience is entitled to the beneficial interest. *Id*. Since equity is involved, the standard of review is de novo, with no reversal unless the trial court's findings were clearly erroneous or this Court concludes that it would have reached a different result had it occupied the court's position. *In re Estes Estate*, 207 Mich App 194, 208; 523 NW2d 863 (1994); *In re Prichard Estate*, 169 Mich App 140, 158; 425 NW2d 744 (1988). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake was made. *Id*. This Court recognizes the superior position of the trial judge to test the credibility of the witnesses, *Chapman v Chapman*, 31 Mich App 576, 579; 188 NW2d 21 (1971), and therefore accords considerable weight to the trial court's findings of fact. *Cerling v Hedstrom*, 51 Mich App 338, 341; 214 NW2d 904 (1974).

A constructive trust may be imposed based on a relationship of trust and confidence that existed between the decedent and the trustee. As explained by the Court in *Kent v Klein*, 352 Mich 652, 656; 91 NW2d 11 (1958):

> [T]he 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. The fact that a thief fleeing with his loot promises nothing avails him nothing. He remains a constructive trustee. [Citations omitted.] [Emphasis added.]

The *Kent* Court, *supra* at 657, further held that wrongdoing is not a prerequisite to establishing a constructive trust:

> [I]t 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.

See also *Chapman, supra* at 579-580.

In the instant case, the decedent's testamentary intent concerning the Michigan real estate was clearly established by the uncontradicted testimony of friends and relatives. The testimony of the decedent's former attorney, Casper O. Grathwohl, is particularly significant in this regard. Grathwohl testified that in 1982 or 1983, the decedent asked him to draft new deeds for three parcels of real estate in Michigan, making her and her two sons joint tenants with survivorship rights. According to Grathwohl, Flora was adamant about avoiding probate costs and having her estate equally divided between her sons and their families. The decedent rejected Grathwohl's suggestions of creating a trust or reserving a life estate for herself in the property. Grathwohl explained to Flora that if one of her sons predeceased her, the property would pass completely to the other son upon her death. However, Flora was certain that she would die first, and even if one of her sons predeceased her, she believed that the surviving son would share and treat the deceased son's family fairly. Flora indicated that she had spoken with her sons and that they knew of her intentions.

Based on this testimony and relying expressly on the *Kent* and *Chapman* decisions, the probate court in the instant case imposed a constructive trust on the Michigan properties equally benefiting petitioner and the issue of Everett. We find no clear error in the probate court's factual findings or legal conclusions regarding the disposition of the Michigan real estate. The trial court accurately recognized that it was presented with factual elements analogous to *Kent* and *Chapman*, *supra*. In both of those

cases, "family relationship, trust, and confidence" combined to necessitate constructive trust relief. *Chapman*, *supra* at 578. Similarly, in the instant case, the evidence of record indicates that the decedent trusted the honor and integrity of her children in carrying out her testamentary intent that they share equally the Michigan properties, despite the premature death of Everett.

Petitioner has a fiduciary duty with regard to his mother's estate in his capacity as personal representative. Although petitioner claims that his mother never informed him that it was her intent that the property be divided equally between him and Everett, such a consideration is irrelevant. *Kent*, *supra* at 656. Moreover, petitioner admitted that he did not know of any reason why the decedent would not have wanted her two sons to share equally.

In light of the family relationship of trust and confidence between the decedent and petitioner, and the unrefuted testimony, set forth above, regarding the decedent's intent as to the ultimate disposition of Michigan real estate, we conclude that the trial court properly imposed a constructive trust over the Michigan property to prevent petitioner's unjust enrichment.[1]

We reach a contrary conclusion with regard to the four life insurance policies. Although the probate court found that the life insurance contracts owned by Flora Queen at her death "were also meant to be shared equally by her sons at her death in line with her 'share and share alike' approach to testamentary dispositions," we find no evidence of record to support the court's findings. Unlike the Michigan property, there was no testimony that the decedent specifically intended for the insurance proceeds to be shared equally.

The four policies at issue were listed in an exhibit introduced at trial. The only information given in the exhibit with regard to these policies is the fact that petitioner alone received the proceeds. Significantly, the exhibit does not indicate whether petitioner received the proceeds because he was the sole named beneficiary or because he was the joint beneficiary who survived his brother. It is clear from the exhibit that the proceeds from a fifth policy, not at issue, were split equally between the petitioner (fifty percent) and Everett's two children (fifty percent). However, in the absence of any evidence, either in the exhibit or otherwise introduced through testimony at trial justifying the supposition that the decedent intended to divide the proceeds of the four insurance policies equally between her sons, we will not presume such a testamentary intent. We therefore find clear error in the probate court's imposition of a constructive trust as to the four insurance policies. The petitioner alone is entitled to the proceeds from those four policies.

Petitioner next contends that the probate court erred in using parole evidence to establish a constructive trust over real estate. We disagree. A constructive trust is an equitable tool, and it is well established that the statute of frauds, MCL 566.106; MSA 26.906, "is not a bar which may be raised in a court of equity by one who has obtained a conveyance by fraudulent means or under circumstances rendering it necessary to impress a constructive trust to grant relief. . ." *Stephenson v Golden*, 279 Mich 710, 747; 276 NW2d 849 (1937). See also, *Digby v Thorson*, 319 Mich 524, 539; 30 NW2d 266 (1948); *Arndt v Vos*, 83 Mich App 484, 488; 268 NW2d 693 (1978). Since the statute of frauds is not a bar to the imposition of a constructive trust, parole evidence is admissible, even in the absence of ambiguity in a deed, to establish the existence of the trust. *Stephenson*, *supra* at 750;

Robair v Dahl, 80 Mich App 458, 462-464; 264 NW2d 27 (1978). We therefore find petitioner's argument to be without merit.

Petitioner next contends that the probate court violated the statute of wills, MCL 700.122; MSA 27.5122, when it impressed the constructive trust on the estate assets. However, this issue has neither been properly preserved for appeal nor adequately briefed. *Dresden v Detroit Macomb Hosp Corp*, 218 Mich App 292, 300; 553 NW2d 387 (1996); *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). In any event, the statute of wills, like the statute of frauds, is not a bar in equity to the imposition of a constructive trust. *Thurn v McAra*, 374 Mich App 22, 23-24; 130 NW2d 887 (1964).

Petitioner finally contends that the trial court erred by disallowing the fee of its handwriting expert as a cost of the estate. Petitioner argues that the expert analysis was necessary to confirm that the signature of Flora Queen that appeared on the annuity was a forgery.

The probate court's decision to allow or disallow an item as a cost of the estate is reviewed by this Court for an abuse of discretion. *In re Eddy Estate*, 354 Mich 334, 347; 92 NW2d 458 (1958); *Estate of Irwin*, 162 Mich App 522, 529; 413 NW2d 37 (1987). Petitioner hired a handwriting analyst to examine the signatures on two annuities' applications to determine whether the decedent's signature had been forged. The fee for the expert's services was $600. However, respondents admitted in their responses to petitioner's request for admissions that Everett signed Flora's name on both applications with her knowledge and consent and so testified at trial. The handwriting analysis was therefore never admitted as evidence at trial. Under these circumstances, the trial court did not abuse its discretion by disallowing payment from the estate for the handwriting analysis fee.

Our disposition of the case renders respondents' conditional cross-appeal nugatory, and we therefore need not address the issues set forth therein.

Affirmed in part and reversed in part.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ Janet T. Neff

[1] The probate court properly recognized that "it is enough that it [the property] be unconscionably withheld," *Kent, supra* at 656, and based its ruling on this principle. However, the court alternatively held that,

> [i]f there need be some showing of wrongdoing on the part of the trustee to impose a constructive trust over property held by the trustee (which this Court believes is unnecessary), the same is established here by Garland Russell Queen's failure to "do right by (his brother)" in sharing the realty involved with his brother's issue as the decedent expected would be done by her sons.

In order to base a constructive trust on the wrongdoing of the constructive trustee, the trustee must have engaged in some wrongdoing (i.e., fraud or deceit) in the acquisition, not retention, of the assets. See *Kent, supra* at 657; *Chapman, supra* at 578-579. To the extent that the probate court found wrongdoing on the part of petitioner in the acquisition of the Michigan property, we hold that the court clearly erred. There is no evidence of record to support such a conclusion.