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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 09/28/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN THE MATTER OF THE ESTATES OF:) 1 CA-CV 09-0767
)
G. MELVIN REESE, Deceased.) DEPARTMENT A
)
WILMA MAE REESE, Deceased.) **MEMORANDUM DECISION**
) (Not for Publication -
ROBERT A. REESE, individually) Rule 28, Arizona Rules
and as putative Personal) of Civil Appellate
Representative of the ESTATE OF) Procedure)
G. MELVIN REESE, Deceased,)
)
Plaintiff/Appellee,)
)
v.)
)
ESTATE OF WILMA MAE REESE,)
Deceased; JOSEPHINE OLIVERSON;)
CLARA ETHEL IRVINE, a married)
woman; and JOHNNY WESLEY WILLIS,)
a married man,)
)
Defendants/Appellants.)
_____)

Appeal from the Superior Court in Maricopa County

Cause Nos. PB2002-004752 and PB2004-002988 (Consolidated)

The Honorable Gerald Porter, Judge *Pro Tempore*

AFFIRMED

Becker & House, PLLC
By Mark E. House
Attorney for Plaintiff/Appellee

Scottsdale

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By Scott A. Swinson
Attorney for Defendants/Appellants

Phoenix

B A R K E R, Judge

¶1 Defendants/appellants Estate of Wilma Mae Reese, Josephine Oliverson, Clara Ethel Irvine, and Johnny Wesley Willis (collectively "defendants" or "appellants") appeal from orders in the probate court directing the transfer to the estate of George Melvin Reese of real property and certain funds they had received from the estate of their mother Wilma Mae Reese ("Wilma"), based on a claim that Wilma had financially exploited her husband, George Melvin Reese ("Melvin"). Appellants contend that Melvin's estate was judicially estopped from collecting on a default judgment against Wilma's estate without permitting Oliverson, Irvine, and Willis to defend on the exploitation claim. They further contend that the claim of Melvin's estate was time-barred and that a constructive trust could not be employed as a general collection devise. For the following reasons, we affirm.

Facts and Procedural History

¶2 Melvin and Wilma Reese were married. Melvin had two children from a prior marriage, Robert A. Reese and Linda Carroll. Wilma had three children from a prior marriage, Josephine Oliverson, Clara Ethel Irvine, and Johnny Wesley Willis.

¶3 Melvin died on May 29, 2002; Wilma died on September 25, 2002.

¶14 On September 16, 2004, Robert Reese ("Reese"), individually and as the putative personal representative of Melvin's estate, filed a Complaint of Financial Exploitation of a Vulnerable Adult, Fraud on the Marital Community, and Petition for Constructive Trust in the probate proceedings for Melvin's estate. The complaint alleged that, after Melvin was declared legally blind in March 1980, Wilma wrongly distributed to her children jointly held and community assets as well as separate property belonging to Melvin. The complaint asserted that Wilma's children were actively involved in Wilma's breaches of trust. The complaint also contended that Oliverson had wrongly transferred real property from the estate to herself. It alleged that Wilma's children, as devisees of Wilma's estate, were holding the contested distributions in constructive trust. On the same date, Reese filed a notice of claim in the probate of Wilma's estate, referencing the complaint filed in Melvin's estate proceedings.

¶15 On September 17, 2004, in the probate proceedings for Wilma's estate, the court appointed Reese as special administrator, noting that such appointment was necessary to allow Reese and Melvin's estate to file a claim against Wilma's estate. On November 8, 2004, the court in Melvin's estate appointed Reese and Carroll as co-personal representatives.

¶16 On March 29, 2006, Reese and Carroll filed an application for entry of default against Wilma's estate. Default was entered on April 12, 2006, and a motion to enter default judgment was filed on September 21, 2006. On December 5, 2006, Irvine, Oliverson, and Willis filed their answer to the Complaint of Financial Exploitation of a Vulnerable Adult, Fraud on the Marital Community, and Petition for Constructive Trust, denying that Wilma had engaged in wrongdoing. They then filed a response to the motion for entry of default judgment against Wilma's estate.

¶17 On February 1, 2007, the court held oral argument on the motion for entry of default judgment. The court ruled that the default judgment would be entered against Wilma's estate, and noted that no one was present to represent the estate with respect to damages. On March 19, 2007, the court entered default judgment against Wilma's estate in the amount of \$2,000,000.

¶18 On April 3, 2007, Reese filed an amended complaint in Melvin's estate, the stated purpose of which was to remove the allegations against Oliverson, Irvine, and Willis regarding financial exploitation. The amended complaint still contained the allegation that Oliverson had wrongfully transferred real property from Wilma's estate to herself.

¶9 On May 4, 2007, Reese, as personal representative of Melvin's estate, filed a Petition for Constructive Trust and Pursuant to Arizona Revised Statutes ("A.R.S.") section 14-3709 (2005) for Order Authorizing Recovery of an Estate Asset in the probate of Wilma's estate. The petition asserted that Wilma had converted and fraudulently distributed funds belonging to Melvin to her children and contended that those distributions were held in constructive trust for the benefit of Melvin's estate. The petition also asserted that non-probate assets had transferred to Wilma's children and that they too were held in constructive trust for the benefit of Melvin's estate. The petition further alleged that, in transferring real property from Wilma's estate to herself, Oliverson misrepresented in an affidavit the value of the property, her right to take the property, and the consent of the other beneficiaries to the transfer. The petition sought an order directing Oliverson to convey title to the residence back to Wilma's estate.

¶10 Oliverson, Irvine, and Willis denied they were in possession of any funds or non-probate assets that had been fraudulently transferred by Wilma and asserted that any claims for the return of non-probate assets were barred by the two-year statute of limitations in A.R.S. § 14-6102(G). They further denied that the real property was wrongly transferred.

¶11 Reese and Carroll, on behalf of Melvin's estate, filed a motion for summary judgment for a determination that the real property transferred by Oliverson from Wilma's estate to herself was invalid because it failed to comply with statutory requirements.

¶12 In August 2007, Reese and Carroll on behalf of Melvin's estate, filed a Motion for Summary Judgment Re Transfer of Title to Residence, seeking a judgment that the transfer was invalid and ordering that the real property be conveyed back to Wilma's estate. The motion argued that the transfer was governed by A.R.S. § 14-3971(E), which permitted the transfer of real property in small estates upon an affidavit stating, among other things, that the value of all real property in the estate was valued at less than \$50,000 and that no person other than the transferee has a right to the property. Submitted with the motion was the affidavit executed by Oliverson in which she avowed that the property was valued at less than \$50,000 and that the other beneficiaries did not object to the transfer. Although the affidavit stated that the other beneficiaries had executed affidavits, no affidavits were attached to Oliverson's affidavit. The motion also included a copy of a website of the Maricopa County Treasurer's Office listing the property's value at \$69,000.

¶13 In response to the motion, Oliverson, Irvine, and Willis noted that Irvine's affidavit expressing consent to the transfer of the property to Oliverson had been filed with Oliverson's affidavit and that Willis had executed a new affidavit stating that at the time of the transfer he was fully informed of and agreed with the transfer.

¶14 In December 2007, the case involving Melvin's estate was consolidated with the proceedings involving Wilma's estate on motion by Reese as special administrator of Wilma's estate.

¶15 The parties submitted a stipulated statement of facts and legal issues in dispute. Among the legal issues in dispute were whether a three-year statute of limitations of A.R.S. § 12-523 (2003) applied to the transfer of title to the residence, whether the two-year statute of limitations of A.R.S. § 14-6102 applied to bar the recovery of non-probate assets, and whether the remedy of constructive trust was available against assets held by Wilma's children in the absence of fraud.

¶16 The court determined that the transfer of the real property by Oliverson was not valid because it did not comply with statutory requirements. The court ordered that the real property be returned to Wilma's estate. The court also found that Reese had timely filed the notice of claim for the non-

probate transfer of assets. On February 28, 2008, the court entered an order in accordance with its ruling.¹

¶17 In January 2009, the court appointed Irvine as the personal representative for Wilma's estate.

¶18 In August 2009, the court set a date for an evidentiary hearing regarding issues pertaining to constructive trust issues and the estate assets. The court authorized the defendants to submit a brief as to any defenses applicable to the real property transferred back to Wilma's estate. Oliverson, Irvine, and Willis asserted that Reese and Carroll were estopped from using the default judgment against Wilma's children, that the remedy of a constructive trust could be imposed only upon specific assets improperly obtained and not general assets of a party, and that the statute of limitations barred recovery of non-probate assets.

¶19 On October 23, 2009, the court entered a signed order directing that Wilma's estate transfer the real property to Melvin's estate. The order indicated that it was made pursuant to the decision of the court of appeals reinstating the default judgment. Irvine, individually and on behalf of Wilma's estate, appealed from the order.

¹ The court also gave the defendants twenty days to file a motion to vacate the default judgment against Wilma's estate. The probate court granted the resulting motion to vacate, but this court reversed that decision and reinstated the default judgment.

¶120 On the day of the scheduled evidentiary hearing, the parties agreed to present stipulated facts regarding the numerical amounts of all non-probate transfers of assets by Wilma and stated that all assets identified on the record would be returned to Melvin's estate. The court denied the estoppel claim by Oliverson, Irvine, and Willis.

¶121 On January 11, 2010, the court entered a lengthy order and judgment based on a stipulated statement of facts. The order concluded that Reese and Carroll were not estopped from asserting constructive trust claims against Wilma's children and that Reese had effectively amended the complaint to remove the financial exploitation claims against Oliverson, Irvine, and Willis. The court concluded that as a result of the dismissal of the financial exploitation allegations against Oliverson, Irvine, and Willis, the only evidentiary issues to be decided by the court were the non-probate transfers and the constructive trust claims. The court ordered that, per the stipulation, certain assets were to be paid to Melvin's estate. Irvine, individually and as personal representative of Wilma's estate, as well as Oliverson and Willis, filed an amended notice of appeal from the October 23, 2009 order and the January 11, 2010 order and judgment. We have jurisdiction pursuant to A.R.S. § 12-2101(J).

Discussion

1. Judicial Estoppel

¶122 Appellants argue that appellees are judicially estopped from collecting assets based on the default judgment against Wilma's estate without permitting them to defend against the exploitation claim. Appellants contend that the probate court entered the default judgment in reliance on appellees' representations at the February 1, 2007 oral argument that they would be able to present those defenses despite entry of the default judgment.

¶123 The doctrine of judicial estoppel precludes a party from taking an inconsistent position in successive or separate actions. *Bank of Am. Nat'l Trust & Sav. Ass'n v. Maricopa Cnty.*, 196 Ariz. 173, 175, ¶ 7, 993 P.2d 1137, 1139 (App. 1999). To apply, it requires a showing that the parties are the same, the question is the same, and the party asserting the inconsistent position was successful in the prior judicial proceeding. *Id.* A party is not considered to be successful in the prior proceeding unless "(a) the court in that proceeding granted the party relief or accepted the . . . inconsistent position either as a preliminary matter or as part of a final disposition, and (b) the party's inconsistent position was a significant factor in the relief granted." *Id.* at 176, ¶ 8, 933 P.2d at 1140.

¶124 The transcript of the February 1, 2007 oral argument does not support appellants' claim that judicial estoppel applies. The transcript shows neither an inconsistent position by appellees nor a reliance by the court on an understanding that appellants would be permitted to defend against the financial exploitation claim.

¶125 In asserting that appellees have taken an inconsistent position, appellants rely on the following language of appellees' counsel:

If they have a valid complaint to the underlying - if they have a valid defense to the underlying complaint, . . . it will not preclude them from defending against the constructive trust remedy.

If we've already - I don't - nothing your Honor is doing here today is going to prejudice anyone other than the estate, and we will have a judgment against the estate . . .

It doesn't preclude them from defending on their own merits.

¶126 Although this language could be interpreted as suggested by appellants to state that they could defend against the exploitation claim in the underlying complaint, it could also be construed as referring to defenses against the constructive trust remedy. However, both before and after making these statements, appellees' counsel made clear that appellees' position was that appellants could not litigate the

facts pertaining to the exploitation claim. Before these statements, appellees stated:

The estate of Wilma Reese has been defaulted and there's no real way to go back and challenge that. The only issue is what is the effect of that. . . . We're entitled to - we're entitled to a judgment on - in the amount of two million dollars and then now we can go try and collect it.

And the beneficiaries have a right on - on the constructive trust remedy to assert a defense to the constructive trust remedy, but they have no ability to go back and defend the underlying financial exploitation claim. That's already been resolved because that claim was against the estate. We've already gotten our remedy. They've already been defaulted.

. . . .

We didn't do any of this surreptitiously. They failed to answer and they failed to respond. They cannot come in now and complain about the underlying substantive merits of our claim. The only thing they can complain about is the constructive trust remedy that we're seeking to impose on them because we have not defaulted them out. But the judgment stands. Now we've just got to go collect it.

After making the statements on which appellants rely, appellees told the court:

[I]f we tomorrow come in and dismiss the claims against the financial exploitation claims against the other folks, we have a default judgment against the estate, we get to move forward on that. There wouldn't be a trial on any of the other issues.

If we elect to continue with those claims, then yes we have to come in and prove up those claims even at the risk that there - that something else - that there may be some kind of conflict.

That doesn't preclude the entry of default against the estate of Wilma Reese. I mean, that was our target. That's our main target. The petition - or excuse me our complaint focused on her behaviors.

And then we have additional behaviors on behalf of [the appellants], but those extra behaviors are what tie them into the financial exploitation.

What we are really seeking is a constructive trust remedy, and they have every right to defend against that. But they do not have a right to go back and challenge the underlying facts which are now treated as established to our financial exploitation claim from the community claim against Wilma Reese.

¶127 The transcript demonstrates clearly that appellees did not take the position in the trial court that appellants could defend on the exploitation claim despite entry of the default judgment.

¶128 In addition, the transcript does not support appellants' claim that the court entered the default judgment in reliance on an understanding that appellants would still be able to assert defenses to the exploitation claim. The court made its decision to enter the default judgment after appellees made clear their position that appellants could not defend on the

exploitation claim. It gave its reason for entering the default as follows:

The case is in a procedural quagmire from the Court's perspective with regard to the estate of Wilma Reese. When the personal representative was appointed, the personal representative was appointed in the Court's opinion for the sole purpose of accepting service of process. That should have put other heirs and devisees on notice that they needed to do something to step in to defend the case. They haven't done anything. They haven't done anything even up to today. If you didn't think that was a problem, that's at your own risk. The default judgment is going to be granted.

¶129 Appellants have not shown that appellees have taken an inconsistent position or that the court entered judgment in reliance on such a position. Judicial estoppel does not apply.²

2. Statute of Limitations: A.R.S. § 12-523

¶130 Appellants argue that A.R.S. § 12-523 bars appellees' attempt to recover the real property from Oliverson through their petition for constructive trust in Wilma's estate. They assert that any action by Wilma's estate to recover the real property must have been brought within three years of the time of accrual. We consider de novo the applicability of a statute of limitations defense where the determination hinges on a

² Parts of appellants' argument regarding judicial estoppel suggest a contention that appellees' exploitation claim against Wilma's children was wrongly dismissed. Appellants have not, however, developed any legal argument to support such a claim.

question of law and not on disputed facts. *Montano v. Browning*, 202 Ariz. 544, 546, ¶ 4, 48 P.3d 494, 496 (App. 2002).

¶131 Section 12-523 states:

A. An action to recover real property from a person in peaceable and adverse possession under title or color of title shall be commenced within three years after the cause of action accrues, and not afterward.

B. "Title" means a regular chain of transfer from or under sovereignty of the soil. "Color of title" means a consecutive chain of such transfer down to the person in possession without being regular, as if one or more of the memorials or muniments is not recorded or not duly recorded or is only in writing, or such like defect as does not extend to or include the want of intrinsic fairness and honesty, or when the party in possession holds the real property by a land warrant or land scrip, with a chain of transfer down to him in possession.

A.R.S. § 12-523 (2003). Appellees contend that Oliverson did not hold the residence under color of title and therefore § 12-523 does not apply.

¶132 "Generally, any instrument purporting to convey land may be color of title, however defective or imperfect it is, and regardless of the reason for its invalidity." 3 Am. Jur. 2d Adverse Possession § 131 (2010). Color of title refers to an instrument that purports to convey title, although in fact it does not. 3 Am. Jur. 2d Adverse Possession § 130.

¶133 We note that the court made no finding of fraud on Oliverson's part. However, the parties do not dispute that Oliverson's affidavit contained erroneous statements and that she therefore did not transfer the property in accordance with the statutory requirements. Appellants argue that the defect in the transfer document does not invalidate the claim of color of title, asserting that § 12-523 contemplates the existence of defects. To give color of title, however, the defect cannot "extend to or include the want of intrinsic fairness and honesty" or render the document "so obviously imperfect as to be apparent to one not skilled in the law." A.R.S. § 12-523(B); 3 Am. Jur. 2d Adverse Possession § 130. Among other errors, the transfer affidavit declared that the affidavits of other beneficiaries were attached to demonstrate no objection to the transfer. However, only Irvine executed an affidavit that was recorded simultaneously with the affidavit. Consequently, Oliverson's affidavit was faulty on its face and the defect apparent. In addition, to find "color of title" and afford Oliverson protection of the three-year limitations period, when she herself created the defective document that transferred the property to herself, would not be consistent with the "intrinsic fairness and honesty" required by § 12-523(B).

¶134 Because Oliverson did not hold the property under color of title, the three-year statute of limitations did not apply to bar appellees' claim.³

3. Statute of Limitations: A.R.S. § 14-6102(G)

¶135 Appellants also argue that A.R.S. § 14-6102(G) bars appellees' action to recover non-probate assets in the form of pay-on-death bank accounts payable to Wilma's children.⁴

¶136 The statute provides that the "transferee of a nonprobate transfer is subject to liability to the decedent's probate estate for allowed claims . . . and statutory allowances . . . to the extent the decedent's probate estate is insufficient to satisfy those claims and allowances." A.R.S. § 14-6102(A) (2005). The statute further provides:

A proceeding under this section must be commenced within two years after the

³ In addition, Melvin's estate filed its action in Melvin's estate within the three-year period and simultaneously filed a claim in Wilma's estate referencing the complaint. The property was transferred on May 15, 2003 and the complaint was filed on September 16, 2004. Appellants argue that Wilma's estate, not Melvin's estate, had jurisdiction to determine issues related to the property of Wilma's estate. Assuming without deciding that to be true, the petition for constructive trust and to recover the property was, in fact, filed in Wilma's estate and decided in consolidated proceedings.

⁴ In the event that appellants may be applying this argument to the real property as well, we note that, by its own terms, the statute does not apply. "For the purposes of [§ 14-6102] a nonprobate transfer is a valid transfer effective at death" A.R.S. § 14-6102(I). The transfer by affidavit of the property by Oliverson pursuant to A.R.S. § 14-3971 was neither valid nor effective at Wilma's death.

decedent's death, but a proceeding on behalf of a creditor whose claim was allowed after proceedings challenging disallowance of the claim may be commenced within sixty days after final allowance of the claims.

A.R.S. § 14-6102(G).

¶137 Reese filed the claim in Wilma's estate on September 16, 2004. The claim asserted that Wilma had transferred assets to third parties and specifically noted that the details were articulated in the complaint filed in Melvin's estate. No personal representative had been appointed for Wilma's estate to allow or disallow the claim. See A.R.S. § 14-3806. Reese had been appointed as special administrator of Wilma's estate only to receive service of the complaint filed in Melvin's estate against Wilma's estate. On April 21, 2008, after the two cases had been consolidated, the court ordered Wilma's beneficiaries to file a petition for the appointment of a personal representative and directed that, once appointed, the personal representative allow or disallow the claim within ten days. On May 8, 2008, the court entered an order vacating the default judgment against Wilma's estate obtained by Melvin's estate. On May 21, Melvin's estate appealed the probate court's decision vacating the default judgment. On January 8, 2009, the court appointed Irvine as personal representative of Wilma's estate. Reese and Carroll, on behalf of Melvin's estate, filed a petition for payment of creditor's claim on April 2, 2009,

noting that a year earlier the court had ordered the personal representative of Wilma's estate to allow or disallow the claim within ten days of appointment and that Irvine had failed to do so. The petition asked the court to deem the claim against Wilma's estate to be admitted. After a hearing on the petition, the court ordered Irvine to either admit or deny the claim against Wilma's estate no later than May 18, 2009. On May 14, 2009, Irvine, as personal representative of Wilma's estate, filed a notice of disallowance of the claim filed by Melvin's estate on September 16, 2004. On June 16, 2009, this court issued a memorandum decision reinstating the default judgment. On July 13, 2009, Reese filed a petition for allowance of the claim, noting that the judgment had been reinstated. The mandate from this court issued on July 31, 2009. On August 26, 2009, the probate court set the issues concerning constructive trust and the estate assets for an evidentiary hearing.

¶138 Appellants argue that appellees' claim does not fall within the sixty-day time frame outlined in § 14-6102(G). They contend that the statute does not permit the claim because the only disallowance of the claim rendered on behalf of Wilma's estate was filed while an appeal was pending on the issue of the propriety of setting aside the default judgment and that the trial court lacked jurisdiction to take any action that was not in furtherance of the appeal.

¶139 In general, when an appeal has been perfected, the trial court loses jurisdiction except for actions in furtherance of the appeal. *In re Estate of Killen*, 188 Ariz. 569, 572, 937 P.2d 1375, 1378 (App. 1996). However, exceptions exist and, under one exception, an appeal from an intermediate order does not deprive the trial court of jurisdiction over matters not involved in the appeal. *Id.* at 572-73, 937 P.2d at 1378-79.

If what the trial court does while the appeal is pending cannot affect or interfere with the subject matter of the appeal, and thus impinge upon the appellate court's power and authority to decide the issues presented to it by the appeal, then the trial court can act.

Id. at 573, 937 P.2d at 1379 (quoting *Bailey v. Bailey*, 392 So. 2d 49, 52 (Fla. Dist. Ct. App. 1981)).

¶140 The judgment on the complaint by Melvin's estate against Wilma's estate is an intermediate order in the probate proceedings. The probate proceedings of the estates have not been closed and the administration is ongoing. The claim filed in Wilma's estate by Melvin's estate, although based on the same conduct as the complaint and the default judgment that was on appeal, was independent of that cause of action. A claim may be made without a complaint being filed, and, once the claim is presented, it must be disallowed, allowed, or deemed allowed, if no action is taken. See A.R.S. § 14-3806. The trial court's order here, requiring action on the claim presented in Wilma's

estate, did not conflict with the proceedings on appeal involving the default judgment. The court had jurisdiction to direct the personal representative in Wilma's estate to address the claim presented in that estate. Consequently, the notice of disallowance of claim filed May 14, 2009, was not a nullity and offered appellee the opportunity to challenge the disallowance. Appellants do not otherwise dispute that the sixty-day provision would allow appellees' claim.

4. Constructive Trust

¶41 Appellants also argue that a constructive trust may be imposed only on improperly obtained assets and that no constructive trust should attach to any assets without a showing that the specific assets were wrongly obtained and transferred by Wilma. Appellees disagree and assert that the default judgment establishes that all funds transferred by Wilma were tainted.

¶42 A constructive trust is an equitable remedy a court may impose upon a clear and convincing showing that title to property was obtained through fraud, misrepresentation, duress or other conduct that would make it unconscionable for the holder of legal title to retain the beneficial interest in the property. *Turley v. Ethington*, 213 Ariz. 640, 643, ¶ 9, 146 P.3d 1282, 1285 (App. 2006); *Chirekos v. Chirekos*, 24 Ariz. App. 223, 224, 537 P.2d 608, 609 (1975).

¶43 Despite appellees' assertion that a constructive trust was an available remedy and the arguments on appeal by both parties, the orders from which appellants appeal do not reflect that the court imposed a constructive trust. The court concluded that the petition for constructive trust was timely filed and that appellees were not estopped from asserting constructive trust claims or from collecting assets pursuant to the petition for constructive trust. The court did not, however, expressly impose a constructive trust. Although the matter was set for an evidentiary hearing, apparently no evidence was presented. Rather, the parties stipulated that certain property would be transferred to Melvin's estate. The court's minute entry states:

Counsel for the Plaintiffs recites parties' stipulated statement of facts regarding the numerical amounts of all non-probate transfers of the assets by Wilma Mae Reese and that all assets identified on the record will be returned to the Estate of George Melvin Reese.

The court's order likewise states that the parties stipulated to certain property being transferred to Melvin's estate. Neither the stipulation transferring the property nor the order that followed conditioned the transfer of property on any subsequent event, such as the finding of a constructive trust. Accordingly, we do not address appellants' argument regarding the propriety of the constructive trust remedy.

Conclusion

¶44 We find that appellees did not present inconsistent positions in the trial court regarding appellants' ability to defend on the exploitation claim and therefore judicial estoppel did not apply to preclude appellees from collecting based on the default judgment. We further find that appellees' claims were not time barred. We do not address appellants' argument regarding the propriety of the imposition of a constructive trust because no constructive trust appears to have been imposed.

/s/

DANIEL A. BARKER, Judge

CONCURRING:

/s/

DONN KESSLER, Presiding Judge

/s/

JON W. THOMPSON, Judge