

DIVISION II

CA06-1322

November 7, 2007

DONNA WHITE

APPELLANT

AN APPEAL FROM PULASKI COUNTY  
CIRCUIT COURT  
[No. PDE-05-574]

v.

BENNIE O'NEIL

APPELLEE

HONORABLE VANN SMITH,  
CIRCUIT JUDGE

AFFIRMED IN PART; REVERSED IN PART

In this appeal, Donna White asserts that the Pulaski County Circuit Court committed ten reversible errors when it imposed a constructive trust on funds held by White. We affirm in part and reverse in part.

In August 2002, Mary Long executed a will naming her niece, Donna White, as executrix. The will devised Long's home to her two daughters, Rosalyn Grind and Felicia Long. Long's car was devised to Rosalyn. The residuary estate was left equally to Rosalyn and Felicia.

In October 2002, Long provided \$20,000 to White for the purpose of opening a joint banking account with the right of survivorship. On November 3, 2004, Long executed a durable power of attorney in favor of White. Long died on November 5, 2004.

A petition to probate Long's will was filed and a hearing was held. The evidence taken at the hearing revealed that White had taken title to Long's vehicle instead of ensuring that it passed to Rosalyn. In addition to taking ownership of Long's car, White convinced Long's daughters to execute a quitclaim deed conveying ownership of Long's home to White. Upon receiving this evidence, the court appointed Bennie O'Neil as administrator CTA of Long's estate. O'Neil then petitioned the court to create a constructive trust to hold the \$20,000 that Long provided to White for the purpose of opening up the joint bank account and to hold the \$10,000 that White received in order to pay Long's medical bills and home mortgage, with the remainder to be divided between Rosalyn and Felicia.

At trial, White asserted that the \$20,000 was a gift from Long. She further testified that after Long's death, she spent most of the money, but that she gave some of it to Rosalyn and Felicia. White paid \$1,925.96 to her bankruptcy trustee and spent \$8,555.91 to buy a car, a roof for her home, and gifts for family and friends. White said that she did not use the funds in the joint account until after Long's death because she did not need the funds. She acknowledged that, in her deposition, she had testified that the \$20,000 was not a gift, but that Long provided her with the funds so that White could transact business on Long's behalf.

White said that the house had been reconveyed to Long's daughters and that Long's car had been conveyed to Rosalyn. White explained that Long had given her the vehicle shortly before her death, instead of leaving it to Rosalyn, because Long was concerned about Rosalyn's drug use.

Lee Berta Keith, Long's longtime friend, testified that Long felt her daughters were not responsible enough to handle money. Consequently, Long gave Keith \$10,000 to purchase a joint certificate of deposit with instructions that, upon her death, Keith was to deliver the funds to White for payment of Long's expenses. Once Long's expenses were paid, the remaining funds were to be distributed to Long's daughters. Keith testified that she delivered the funds to White with Long's instructions.

Annie Robinson, Long's sister and one of White's aunts, testified that she visited Long in the hospital shortly before her death. During that visit, she heard Long tell White that the \$20,000 was to be divided equally between Long's daughters. Robinson also testified that White gave the daughters only \$7,000 of the \$10,000 Long had left with Lee Berta Keith and that White kept the remaining \$3,000 for herself.

Rosalyn testified that she and her sister quitclaimed their mother's house to White two or three days after their mother's death because White told them that it was for their protection. White told Rosalyn that her stepfather was still married to Long and that he might attempt to take the property when he was released from prison. Rosalyn said she did not understand that she was conveying title to the property when she executed the quitclaim. She also said her mother owed only about \$2,000 on the home at the time of her death.

White's mother, Barbara Taylor, testified that the \$20,000 was a gift from Long to White. She asserted that Long told White to sell the house and divide the proceeds equally between Long's daughters. Taylor also testified that Long told White to give her car to Felicia only if Felicia graduated but that White was to sell the car if Felicia failed to

graduate. Taylor admitted, on cross-examination, that White had given her gifts of \$2,000 and \$3,000.

The circuit court found that White and Long shared a confidential relationship; that White breached her fiduciary duty to Long; and that White committed fraud and misrepresentation. The court, therefore, considered extrinsic evidence regarding Long's intentions when she opened the joint account with White. After considering those intentions, the circuit court imposed a constructive trust on the funds in the joint account held by White. The court entered a judgment against White for \$22,000 plus \$2,500 in attorney's fees. White filed a timely notice of appeal.

White's first point on appeal is that the circuit court lacked subject-matter jurisdiction because the "probate court" is a court of limited jurisdiction. White characterizes the issue as one of subject-matter jurisdiction that can be raised at any time, even for the first time on appeal. We addressed this issue in *Smith v. McCracken*, 96 Ark. App. 270, \_\_\_ S.W.3d \_\_\_ (2006). In *Smith*, we held that:

Amendment 80 merged in Arkansas what were once chancery and circuit courts into circuit courts, so that any circuit court would thereafter have jurisdiction "over *all matters* previously cognizable by Circuit, Chancery, Probate, and Juvenile Courts." *See* Amend. 80 § 19(B)(1) (emphasis added). Amendment 80 § 6(A) provides that circuit courts are established as the trial courts of original jurisdiction of all justiciable matters not otherwise assigned pursuant to the Arkansas Constitution. Section 6(B) of this same amendment allows the division of the circuit court into subject-matter divisions and provides that *any* judge within the circuit may sit in *any division*.

In turn, Administrative Order Number 14 regulates the administration of circuit courts and established the following subject matter divisions: criminal, civil, juvenile, probate, and domestic relations. *See* Admin. Order No. 14(1)(a). This order defines "probate" to include adoptions and defines "domestic relations" to include custody. *See id.* However, Order 14(1)(a) also states:

*the designation of divisions is for the purpose of judicial administration and caseload management and is not for the purpose of subject-matter jurisdiction. The creation of divisions shall in no way limit the powers and duties of the judges to hear all matters within the jurisdiction of the circuit court.*

(Emphasis added.)

We are convinced that the purpose of Amendment 80 was to eliminate the artificial distinctions regarding a circuit court's jurisdiction that Smith would have us reimpose. Pursuant to Amendment 80, circuit courts simply have added to their already existing jurisdiction as courts of law the equitable jurisdiction that chancery courts held prior to adoption of the amendment. *See [First Nat'l Bank v. Cruthis, 360 Ark. 528, 203 S.W.3d 88 (2005)]*. As the Arkansas Supreme Court stated in regard to the passage of Amendment 80: "Jurisdictional lines that previously forced cases to be divided artificially and litigated separately in different courts have been eliminated." *In Re: Imp. of Amend. 80, 345 Ark. Appx. 664, 665, 345 Ark. 577, 47 S.W.3d 262 (2001)*.

In other words, a circuit court may now exercise any act of jurisdiction that either a court of law or equity could have exercised prior to Amendment 80, and further, the designation of an action as a specific type of action does not prevent a circuit court from hearing any matter within the court's jurisdiction that is properly raised to the court. In this case, the issue of custody was before the circuit court because the McCrackens requested custody of K.E.E., as well as the right to adopt her. Accordingly, the circuit court had the power to determine custody of K.E.E. after it dismissed the adoption petitions.

96 Ark. App. at 274-75, \_\_\_ S.W.3d at \_\_\_. For the reasons set forth in *Smith*, we affirm on this point.

White's second point is that the circuit court erred in denying her a jury trial. In a letter opinion, the circuit court noted that the case involved both equitable and legal issues and concluded that the clean-up doctrine permitted it to try the entire case without the intervention of a jury. The clean-up doctrine provides that once a court of equity acquires jurisdiction over a case, it may decide all other issues, legal or equitable. *Colclasure v. Kansas City Life Ins. Co., 290 Ark. 585, 720 S.W.2d 916 (1986)*. White does not address the

circuit court's reliance on the clean-up doctrine to deny the parties a jury trial. Where an appellant fails to address the basis for the trial court's ruling, this court will not reverse. *See Dongieux's v. Shoaf*, 271 Ark. 197, 608 S.W.2d 33 (Ark. App. 1980). Moreover, the circuit court could properly rely on the clean-up doctrine. Prior to the adoption of Amendment 80, our supreme court held that application of the clean-up doctrine did not impinge upon the constitutional right to trial by jury. *Colclasure, supra*.

In her third, fourth, and sixth points on appeal, White argues that the funds in the two joint accounts are outside of the circuit court's jurisdiction. She relies on Ark. Code Ann. § 23-47-204(b)(2) (Repl. 2000), which makes the designation of the ownership interest in the account documents "conclusive evidence" of the intention of all depositors. Therefore, ownership in these funds are vested in the manner specified in the account documents.

We disagree with White's argument. The circuit court was permitted to look beyond the account documents to determine Long's intent because it found that White committed fraud and misrepresentation. *See Nichols v. Wray*, 325 Ark. 326, 925 S.W.2d 785 (1996). In *Nichols*, our supreme court reaffirmed that Ark. Code Ann. § 23-32-1005 made the creation of a joint bank account with right of survivorship "conclusive evidence" of the parties' intent that the account was to pass to the survivor upon the death of the other and that it was error for the trial court to consider other evidence of the decedent's intent.<sup>1</sup> This rule, however, applies to cases in which there is no showing of fraud or other impropriety. The circuit court

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<sup>1</sup>Section 23-32-1005 was repealed by Act 89 of 1997, which also enacted what is now section 23-47-204.

specifically found that White committed fraud and misrepresentation. Therefore, it did not err in looking beyond the account documents.

White asserts as her fifth point that the circuit court erred in admitting hearsay evidence by Annie Robinson to establish that Long intended for her daughters to share equally in the funds from her joint account with Long. White argues that this was the only evidence to show an intention contrary to the account documents. As noted above, Robinson testified that she overheard a conversation between Long and White, shortly before Long's death, in which Long and White discussed how the proceeds from the joint account were to be divided. This court reviews evidentiary errors under an abuse-of-discretion standard. *Hunt v. Perry*, 357 Ark. 224, 162 S.W.3d 891 (2004). We hold that any error in the admission of this testimony is harmless because the substance of this testimony had already been introduced by Geneva Williamson, who testified without objection that White told her that Long had given White the \$20,000 with instructions that it be used to pay Long's expenses. It has long been the rule that there is no prejudice in admitting evidence that is merely cumulative or repetitious of other evidence admitted without objection. *JAG Consulting v. Eubanks*, 77 Ark. App. 232, 72 S.W.3d 549 (2002).

White's seventh point is that the circuit court erred in finding that she converted the funds. We will not address this point because the circuit court made no such finding. *See Parkerson v. Arthur*, 83 Ark. App. 240, 125 S.W.3d 825 (2003). Although the complaint contained an allegation of conversion, the circuit court did not reach that issue.

White's eighth point is that the parol evidence rule bars the testimony that Long intended that White use the funds in the joint account for the benefit of her daughters. We disagree because White is making the same argument that our supreme court rejected in *Hall v. Superior Federal Bank*, 303 Ark. 125, 794 S.W.2d 611 (1990). In *Hall*, the court held as follows:

Appellant contends the signature cards for the respective accounts represented a written contract between the parties and the bank. Thus, she maintains the trial court erred in admitting parol evidence to alter the terms of the written contract, *i.e.*, joint tenancy. Strictly speaking, the trial court did not admit parol evidence to alter the signature cards. The extrinsic evidence admitted by the court proved facts sufficient for her to find that a constructive trust existed, concluding therefrom that Mrs. Edwards never intended for appellant to receive her money. A constructive trust is not within the statute of frauds and may be proved by parol evidence. Thus, the trial court properly admitted extrinsic evidence as to the Merrill Lynch account.

303 Ark. at 135-36, 794 S.W.2d at 616 (citation omitted).

In White's ninth point, she asserts that the circuit court erred in considering evidence concerning her bankruptcy case because it was irrelevant and inadmissible. The standard of review on admission of evidence is abuse of discretion. *FMC Corp., Inc. v. Helton*, 360 Ark. 465, 202 S.W.3d 490 (2005). Abuse of discretion is a high threshold that does not simply require error in the trial court's decision but requires that the trial court act improvidently, thoughtlessly, or without due consideration. *Id.*

The trial court did not abuse its discretion in admitting the evidence regarding White's bankruptcy case. White introduced evidence to prove that the \$20,000 in the joint account was a gift from Long. White's bankruptcy records, however, show that she was in bankruptcy before Long's death and was threatened with dismissal of her case, but that she

did not use the funds in the joint account to bring her bankruptcy payments current until after Long died. The circuit court admitted the testimony to show that White knew the funds in the joint account were not hers because she did not use those funds until after Long's death. The evidence regarding White's bankruptcy case was admissible to impeach White's credibility and to show her motive for acting as she did because a matter is not collateral if it is relevant to show bias, intent, or knowledge. *Balentine v. Sparkman*, 327 Ark. 180, 937 S.W.2d 647 (1997).

White's tenth and final point is that the circuit court erred in awarding O'Neil attorney's fees. White asserts that the court lacked authority to award fees. We have noted that, as a general rule, attorney's fees are not allowed in Arkansas unless expressly authorized by statute. *Shelter Mut. Ins. Co. v. Kennedy*, 347 Ark. 184, 60 S.W.3d 458 (2001). Neither O'Neil nor the circuit court cite any authority for an award of fees under these circumstances.<sup>2</sup> Therefore, we reverse on this point.

Affirmed in part; reversed in part.

HART and GLOVER, JJ., agree.

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<sup>2</sup>This is not to preclude O'Neil from receiving a fee to be paid by the estate. *See* Ark. Code Ann. §§ 28-48-108, -109.