STATE OF MICHIGAN

IN THE SUPREME COURT

In re FILIBECK Estate.

HEIDI J. FILIBECK, Personal Representative of the ESTATE OF STEPHEN J. FILIBECK,

Plaintiff-Appellee,

v

LAURA J. BEAL,

Defendant-Appellant.

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DEFENDANT-APPELLANT LAURA BEAL'S APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

	Page
INDEX TO AUTHORITIES	iii
STATEMENT OF BASIS OF JURISDICTION	vi
STATEMENT REGARDING ORDER FROM WHICH APPEAL IS TAKEN	vii
STATEMENT OF THE QUESTIONS PRESENTED	viii
INTRODUCTION AND REASONS FOR GRANTING THE APPLICATION	1
STATEMENT OF FACTS AND PROCEEDINGS	9
ARGUMENT I	13
DOES NOT THE LAW OF CONSTRUCTIVE TRUSTS REQUIRE FOR THE COURT TO FIND THAT SOMEONE ELSE OWNS THE PROPERTY, BEFORE IT CAN TAKE TITLE AWAY FROM THE ACTUAL LEGAL TITLE HOLDER?	
ARGUMENT II	20
IF TITLE TO MONIES RAISED, BY ONE PERSON FOR THE BENEFIT OF ANOTHER, IS, BY WAY OF COURT IMPOSED CONSTRUCTIVE TRUST, GIVEN TO THE PERSON FOR WHOSE BENEFIT THE MONIES WERE RAISED, DOES NOT THAT PERSON THEN HAVE A SUFFICIENT ENOUGH OWNERSHIP INTEREST (EITHER PRESENT OR EXPECTANT) TO BE ABLE TO MAKE A GIFT OF THOSE MONIES?	
ARGUMENT III	24
IS THE DELIVERY ELEMENT OF A VALID GIFT MET WHEN THE ITEM GIFTED IS ALREADY IN THE POSSESSION OF THE DONEE AT THE TIME THE GIFT IS MADE?	
SUMMARY	28
RELIEF REQUESTED	31

INDEX TO AUTHORITIES

CASES **Page**

Arndt v. Vos, 83 Mich. App. 484, 268 N.W.2d 693 (1978) . . 15

Ayar v. Foodland Distributors, 472 Mich. 713, 698 N.W.2d 875 (2005) 22

Babcock v. Fisk, 327 Mich. 72, 41 N.W.2d 479 (1950) . . . 5,6,7

Barrow v. Detroit Election Comm., 301 Mich. App. 404 411, 836 NW2d 498 (2013) 25

Brooks v. Gillow, 352 Mich. 189, 89 N.W.2d 457 (1958) . . 25

Burt v. Bank of Saginaw, 241 Mich. 216, 223, 217 N.W. 71 (1928) vii,26,30

Cerling v. Hedstrom, 51 Mich. App. 338, 214 N.W.2d 904 (1974) 18

Chapman v. Chapman, 31 Mich. App. 576, 188 N.W.2d 21 (1971) 16

Davidson v. Bugbee, 227 Mich. App. 264, 268, 575 N.W.2d 574 (1997) vii,26,30

Detroit Bank and Trust Company v. Grout, 95 Mich App 253, 277-8, 289 NW2d 898, 909 (1980) 4

Digby v. Thorson, 319 Mich. 524, 30 N.W.2d 266 (1948) . . 16

Doster v. Estes, 126 Mich. App. 497, 337 N.W.2d 549 (1983) 14

Grasman v. Jelsema, 70 Mich. App. 745, 246 N.W.2d 322 (1976) 15,19

Guise v. Robinson, 219 Mich. App. 139, 555 N.W.2d 887 (1996) 21

Indian Tribes v. U of M Regents, 104 Mich. App. 482, 305 N.W.2d 522 (1981) 15,16

In the Matter of Maribel Gonzalez, deceased,

262 N.J. Super. 456, 621 A.2d 94 (1992) 1

Irvin v. Irvin, 93 Mich. App. 770, 286 N.W.2d 920 (1980) 13

Kent v. Klein, 352 Mich. 652, 91 N.W.2d 11 (1958) 17

King v. State, 488 Mich. 208, 793 N.W.2d 673 (2010) 14

Martin v. Martin, 37 Mich. App. 208, 211, 194 NW2d 552 (1971) 18

Molenda v. Simonson, 307 Mich. 139, 11 N.W.2d 835 (1943) 25

Olitkowski v. Loan Assn., 302 Mich 303, 4 N.W.2d 664 (1942) 15

Olson v. Olson, 273 Mich. App. 347, 729 N.W.2d 908 (2006) 22

Rancho v. Beach, 254 Mich. 600, 236 N.W. 875 (1931) 16

Robair v. Dahl, 80 Mich. App. 458, 264 N.W.2d 27 (1978) 21

Rupe v. Cingros, 7 Mich. App. 146, 151 N.W.2d 178 (1967) 14

Sloman v. Cutler, 258 Mich. 372, 374, 242 NW 735 (1932) . . . 22

Stephenson v. Golden, 279 Mich. 710, 276 N.W. 845 (1937) 15,17

Tkachik v. Mandeville, 487 Mich. 38, 790 N.W.2d 260 (2010) 21

U.S. Four Hundred Seventy Seven (477) Firearms, 698 F. Supp. 2d 894 (E.D. Mich. 3-12-2010) 26

COURT RULES **Page**

MCR 7.301(A)(2) v

MCR 7.302 v

MCR 7.302(B)(3) 8

MCR 7.302(B)(5) 8

MCR 7.302(H)(1) 9,31

STATUTES **Page**

MCL 554.35 . . . . . vii,4,5,7,23,29

STATEMENT OF BASIS OF JURISDICTION

This is an Application for Leave to Appeal the June 5, 2014 published Opinion/Order of the Court of Appeals, brought by Defendant-Appellant Laura Beal pursuant to *MCR 7.302*. *MCR 7.301(A)(2)*, confers jurisdiction over such matters in this Court. The Application is being submitted within 42 days of the filing date of the Court of Appeals' Opinion/Order and is therefore timely submitted.

STATEMENT REGARDING ORDER FROM WHICH APPEAL IS TAKEN

Defendant-Appellant Laura Beal, seeks leave to appeal the decision of the Court of Appeals, affirming the Menominee County Probate Court's award of approximately $30,000.00 of unused fundraised monies, under a constructive trust theory, to the estate of the decedent, for whose benefit the monies had been raised by his two daughters, notwithstanding decedent's gift of those monies to his two daughters before he died.

The gift was invalidated by the Court of Appeals on two separate grounds. First was that the decedent's interest in the monies gifted was an expectancy interest only, not an ownership interest, and, as such, could not be gifted. This ruling is clearly erroneous as being in direct violation to *MCL 554.35*, which allows for expectancy interests to be gifted.

Second was that the required element of delivery was missing. This ruling is also clearly erroneous as being contrary to the established case law of this State that delivery is satisfied when the item gifted is already in possession of the donee at the time the gift is made. [*Burt v. Bank of Saginaw, 241 Mich. 216, 223, 217 N.W. 71 (1928); Davidson v. Bugbee, 227 Mich. App. 264, 268, 575 N.W.2d 574 (1997)*]

The Menominee County Probate Court October 22, 2012 Decision is attached hereto as Exhibit A. The Court of Appeals June 5, 2014 Opinion and Order is attached hereto as Exhibit B.

STATEMENT OF THE QUESTIONS PRESENTED

I.

DOES NOT THE LAW OF CONSTRUCTIVE TRUSTS REQUIRE FOR THE COURT TO FIND THAT SOMEONE ELSE OWNS THE PROPERTY, BEFORE IT CAN TAKE TITLE AWAY FROM THE ACTUAL LEGAL TITLE HOLDER?

Defendant/Appellant says "YES"
Trial Court said "NO"
Court of Appeals said "NO"
This Court should say "YES"

II.

IF TITLE TO MONIES RAISED, BY ONE PERSON FOR THE BENEFIT OF ANOTHER, IS, BY WAY OF COURT IMPOSED CONSTRUCTIVE TRUST, GIVEN TO THE PERSON FOR WHOSE BENEFIT THE MONIES WERE RAISED, DOES NOT THAT PERSON THEN HAVE A SUFFICIENT ENOUGH OWNERSHIP INTEREST (EITHER PRESENT OR EXPECTANT) TO BE ABLE TO MAKE A GIFT OF THOSE MONIES?

Defendant/Appellant says "YES"
Trial Court said "NO"
Court of Appeals said "NO"
This Court should say "YES"

III.

IS THE DELIVERY ELEMENT OF A VALID GIFT MET WHEN THE ITEM GIFTED IS ALREADY IN THE POSSESSION OF THE DONEE AT THE TIME THE GIFT IS MADE?

Defendant/Appellant says "YES"
Trial Court did not address
Court of Appeals said "NO"
This Court should say "YES"

INTRODUCTION AND REASONS FOR GRANTING THE APPLICATION

This is an appeal from a published Court of Appeals decision affirming the Menominee County Probate Court's imposition of a constructive trust, over monies on deposit in a local bank account in the name of Defendant/Appellant, and ordering that those monies had to be paid to the Plaintiff/Appellee Estate, even though the court found that decedent had gifted the monies before he died to his two daughters, who raised them thru a fundraiser they held for the benefit of their terminally ill father; the court holding for the gift to be invalid on the ground that decedent only owned an expectancy interest in the monies which could not be gifted.

This case deals with a fairly common factual situation, and it raises an important legal issue of first impression to the jurisprudence of the State of Michigan, i.e. - who is the owner of monies which are raised through the fundraising efforts of one person (a daughter) for the benefit of another person (her father). Surprisingly, there is little reported case law to be found on this issue in other jurisdictions as well. One factually similar case was found in New Jersey; being the case of *In the Matter of Maribel Gonzalez, deceased, 262 N.J. Super. 456, 621 A.2d 94 (1992)*. In that case the new Jersey court said:

> The **very common factual background** of this contested motion surprisingly **has not been addressed in any prior** reported New Jersey **opinion**. (Emphasis supplied.)

With the facts of this case being clear, straight-forward, and in relevant part uncontested, it allowed a good opportunity for the establishment of some sound case law on an important legal issue; unfortunately the Court of Appeals did not provide this. Rather, both that Court and the trial court failed to answer this ownership question head-on, and, in dancing around it, they have each severely misinterpreted and erroneously applied existing law regarding both constructive trusts and gifts. In the process of these judicial misadventures, both lower Courts ultimately relied upon and used equity to sanction an injustice, rather than prevent one; a true perversion of their equitable authority. This Court needs to intervene to both correct the clear errors committed and to identify what Michigan law is on this important legal issue.

Both lower Courts found for the imposition of a constructive trust to be appropriate, and for the subject monies to belong to the decedent's estate, yet they also specifically found that the decedent did not own the monies. These are dead-on contradictory rulings, as a decedent's estate is only comprised of property owned by a decedent. Both Courts failed to answer two important questions: [1] how monies not owned by a decedent could be ordered paid into his estate, and [2] how legal title to monies could be taken away from the daughter, under a constructive trust theory, without the court first finding and identifying their true owner; these answers have rather been left to speculation and conjecture.

The law of constructive trusts has been established, and well settled, in Michigan for many years. A constructive trust is neither an actual existing trust, nor a trust which is to be set up by the court for future use. Rather, a constructive trust is a creature of equity used when a court of equity specifically finds that property legal owned by one person really belongs to another - the "true" owner. It is a legal fiction used to recognize the rights of the "true" owner and, in doing so, accomplish justice.

Once the court determines for someone other than the legal owner to be the true owner of property, that true owner's rights are immediately established, retroactive to the time the property first came into the legal ownership of the other person. That other person's ownership is stripped away, as though it never existed, and they are considered as having held their "legal" title as a trustee for the benefit of the true owner; hence the legal fiction of a "constructive trust" having existed. A constructive trust exists retroactively, not prospectively.

Therefore, in order for a court to use the equitable remedy of constructive trust, it must first find for someone other than the legal owner of the property to be the true owner, and it must identify who that true owner is. The lower Courts in this matter never tell us who the true owner of the fundraised monies is. They only tell us who the owner is not; it is not the daughter, who raised the monies, and it is not her father, for whose benefit

she raised them. They then contradict their finding that the father is not the owner by ordering the money paid to his estate. (See the ICLE Case Summary, attached hereto as Exhibit C, showing how the Court of Appeals Opinion in this case has been reported and is being circulated throughout the State.)

The primary function of a court's written opinion is to answer the legal questions presented in the case. This should be done in a clear, straight-forward, legally supported and reasoned fashion, so the answers given are understandable by the parties, the bench & bar, and the public at-large. Unfortunately trying to answer who the lower courts found for the true owner of the fundraised monies to be (and why), by reading their opinions, is like trying to answer the question "Where's Waldo?"; it is very difficult to determine and no one seems to know for sure.

The trial court misapplied both the law of constructive trusts, and the case of *Detroit Bank and Trust Company v. Grout, 95 Mich App 253, 277-8, 289 NW2d 898, 909 (1980)* - an actual trust case, both of which it relied upon in "**setting up**" an *inter vivos* trust and ordering for the monies to be paid into the decedent's Estate. In doing so, it also found that the decedent held an "expectancy" interest in the account funds (presumably as the remainder beneficiary of the trust it had set up). This, at least, served to create a nexus between the decedent and the funds so as to justify them being ordered paid into his Estate; which

of that statute must have on the trial court's Decision in this regard, notwithstanding that it was the main issue on appeal.

The Court of Appeals actually seems to be somewhat unsure of its poorly reasoned decision, by attempting to justify its ruling at the end of the Opinion, where it states: "***In any event***, *... there is no evidence that Stephen made any kind of delivery, not even de minimus constructive delivery. That being the case, we must conclude that no valid gift occurred."* (p. 4) (Emphasis added.) This is again, unfortunately, a ruling that is contrary to the existing, and long standing, law of this State with regard to the making of gifts. Although delivery is an element of a valid gift, that element is met when the donee is already in possession of the gifted property at the time the gift is made, which is clearly the fact in this case.

Therefore, to provide proper case law guidance to the bench, bar, and general public, on an important and significant legal issue of first impression in this State [*MCR 7.302(B)(3)*]; to correct the clearly erroneous decision of the Court of Appeals and prevent the contradictions and confusion caused by its misapplication of well-established and long standing case law, statutory law, and equitable theories [*MCR 7.302(B)(5)*]; and to prevent the material injustice which has obviously been caused by this clearly erroneous Court of Appeals decision; this Court needs to either grant the application, enter a correct final decision,

or enter a peremptory order of reversal, pursuant to *MCR 7.302(H)(1)*.

To leave this case in its current erroneous and muddled state, and thereby let stand the contradictions and confusion created by the Court of Appeals decision with regard to the law of constructive trusts and gifts, as well as leave unresolved the important issue of first impression which this case raises, would be doing a great disservice to the profession and the public alike, not to mention the litigants who have much invested in trying to receive some modicum of justice in this matter, in accordance with the wishes and desires of their deceased father.

STATEMENT OF FACTS AND PROCEEDINGS

The material facts of this case, which are substantially uncontroverted, and the proceedings had thus far, are as follows:

1. The decedent, Stephen R. Filibeck (hereinafter also Steve), died intestate on September 10, 2010. At that time he was married to Heidi Filibeck (hereinafter also Heidi), his second wife of approximately four and one half years. They had no children together; however, Steve had two adult daughters, Laura Filibeck, n/k/a Laura Beal (hereinafter also Laura), and Lisa Filibeck (hereinafter also Lisa), from his first marriage to Tammy Weinschrott (hereinafter also Tammy). Heidi also had three children of her own. [Trial Transcript (hereinafter TT), pgs. 168,

was done by the trial court pursuant to *MCL 554.35*, which makes expectancy interests "*descendible*".

The problem, however, is that this statute also makes expectancy interests "*alienable*", meaning they can be gifted, and the trial court also found that decedent had gifted these monies to his two daughters before he died. Unexplainably, however, and without any reference to *MCL 554.35*, the trial court invalidated that gift because the decedent did not "own" the funds, but rather only held an expectancy interest in them. The clear error of this ruling was the main basis of the appeal to the Court of Appeals, and while that Court upheld all of the trial court's findings (including the decedent's ownership of the "expectancy" interest and his making of the gift), it never addresses this erroneous ruling, nor even makes any mention of *MCL 554.35*, in its Opinion.

Rather the Court of Appeals, in its own misapplication of the law of constructive trusts, apparently believed a court of equity can, through the use of this doctrine, establish a trust for the parties. It relies heavily on the case of *Babcock v. Fisk, 327 Mich. 72, 41 N.W.2d 479 (1950)* in its Opinion, however, also misapplies the ruling in that case, and fails to properly distinguish the extremely important factual differences between that case and the present one.

Paramount in that regard is how the funds were raised, for whose benefit they were raised, and how they were to be managed.

In *Babcock*, a group of "sympathetic people" (non-family members), thru a statewide newspaper campaign, *solicited for cash donations* to be sent to an endowment fund which they set up at a bank to be managed by appointed trustees. These monies were for the benefit of a 4 year old child. In the case at bar, the *monies were raised* by way of a local dinner dance and raffle organized by a daughter for the benefit of her terminally ill adult father (TT, p.58), and they were deposited into a bank account in her name, with his full knowledge and consent, and at his direction (TT, pg. 127).

While *Babcock* is the only Michigan case even close to being of precedential value to our issue, its factual differences are major and cannot be ignored. The Court of Appeals, unfortunately, did just that and made no attempt to explain, reconcile, or otherwise deal with those differences. And, worse yet, the Court of Appeals does not even mention in its Opinion the ruling in the *Babcock* case that is most important and applicable to this case, i.e. - that all donated monies remaining when the young girl reached the age of majority (then 21) were to be turned over to her outright, as her absolute property, and the trust terminated.

The trust in *Babcock* was quite obviously left in place by the court simply because of the minority age of the person for whose benefit those monies had been raised. That ruling was well reasoned and makes good sense under the facts of that case. Why the Court of Appeals in this case, however, believed that *Babcock*

required for it to have to set up a trust to act as owner of the funds raised by a daughter for the benefit of her 62 year old father, which were placed in an account in her name at her father's direction, and with his full knowledge and consent, is neither known, nor can it be deciphered from the Opinion rendered.

The *Babcock* ruling, when correctly reasoned and properly applied to the facts of this case, actually supports the position of the Defendant/Appellant that she and her sister were the legal owners of the account monies, as the donees of the gift made to them by their father. Under the *Babcock* ruling, the decedent in this case would be the owner of the raised monies, and as owner would have had the right to gift them away. Although *Babcock* was argued to the trial court by Defendant/Appellant, in support of her position, it was not even mentioned in that court's Decision.

While not actually saying so, it appears, from its cursory discussion of *Babcock*, that the Court of Appeals felt it was the court created trust that owned the funds. And that it further agreed, thru its affirmance of the trial court's Decision, that the decedent held an expectancy interest in those funds which he could not gift, but which rather had to descend to his heirs per *MCL 554.35*. This must be arrived at through speculation however, as the Court of Appeals fails to even mention *MCL 554.35* in its Opinion; nor does it discuss the effect the "alienable" language

172, 202, & 232; Trial Court Decision dated October 22, 2012 (hereinafter TCD), p. 1]

2. After their divorce, Steve and Tammy remained very close right up until the time of his death. Steve was also very close with his two daughters, both of whom had lived with him after the divorce, and until they left home to attend college. (TT, pgs. 123, 194, 202, & 232-233]

3. Steve was employed for many years by the State of Michigan, as a custodian at its Stephenson, Michigan State Police Post, however had been laid off in October of 2009, due to budget cuts. As a result, Steve lost his employment benefits, including, but not limited to, his health insurance.

(TT, pgs. 78, 88, & 245; TCD, p. 1; Defendant's Exhibits 4 & 5]

4. Approximately 6 months later, in April of 2010, Steve was diagnosed with cancer which he learned would require extensive medical treatment, including chemotherapy, at an exorbitant cost, for which he then had no insurance coverage. It was this cancer which ultimately took his life 4½ months later. (TT, pgs. 79-80, 244, & 252; Defendant's Exhibits 4 & 5]

5. His daughter Laura came up with the idea of putting on a benefit dinner/dance/raffle for her father as a means of raising money to help cover the cost of his chemotherapy. She then put forth the extensive time and effort needed to plan, coordinate, organize, and host the affair. Approximately $45,000.00 was

raised through the sale of tickets to an all you could eat and drink dinner, live entertainment and dancing, and a chance to win an extensive array of donated prizes, by way of a number of different raffles and auctions which were conducted throughout the evening of the benefit. Neither Steve, nor his wife Heidi, were in any way involved with the planning or hosting of this benefit. (TT, pgs. 54, 58, 70-73, 75-76, 89-91, 181, 186, 213-215, & 246-249; TCD, p. 1; Defendant's Exhibits 4 & 5)

6. The monies raised by Laura, by way of this benefit, were all put into a separate personal bank account entitled in Laura's name alone, with her sister Lisa named as payable on death beneficiary. Steve, whose name was not on the account, both requested, and approved of, this being done, and was also provided with copies of the account opening card and the regular account statements. (TT, pgs. 16-17, 26, 123-127, & 249-250; TCD, p. 1)

7. After the benefit was held, and the monies raised, Steve and his family learned that the State Troopers had taken action on his behalf to get his employment reinstated, so he could then formally retire with all of his employment benefits reinstated, including his health insurance. (TT, pgs. 91, & 245-246; TCD, p.1)

8. Due to both [1] the reinstatement of Steve's health insurance and [2] a reduction/waiver of a lot of Steve's medical bills obtained through the actions of Laura, who was employed as a certified medical provider at the local hospital where Steve had

received his medical treatments, all of Steve's medical bills were paid in full without Laura needing to use most of the benefit monies she had raised. (TT, pgs. 48-49, 188, 213-214, 252-260; TCD, pgs. 1 & 2)

9. Laura, after consulting with Steve as to what he might like to have done with those benefit monies, ultimately [1] used $9,500.00 to pay off the mortgage on Steve's home, so that Heidi would not have any mortgage payment, [2] paid some other miscellaneous expenses totaling $2,250.00, and [3] then split the remaining balance, of approximately $30,600.00, equally between herself and Lisa, for use in completing their educations. All of these expenditures were made with the full knowledge, consent, and approval, and at the specific direction, of Steve. (TT, pgs. 129, 140-147, 223-227, 237-239, & 249-252; TCD, pgs. 1 & 2]

10. After Steve died, Heidi had herself appointed as Personal Representative of his Estate. She then filed a criminal complaint against Laura, alleging Laura had embezzled the benefit monies. This complaint was investigated by the Michigan State Police and resulted in no formal criminal charges being brought, per both the findings of the investigation and the decision of the Menominee County Prosecuting Attorney's office. (TT, pgs. 12-17, 26, & 28-29)

11. Heidi also brought the present civil action against Laura to recover for the Estate, and ultimately herself as the

primary beneficiary of the Estate, the benefit monies received by Laura and Lisa, under a constructive trust theory.

12. The Probate Court, after setting forth its findings in a three page Decision, ruled that an *inter vivos* constructive trust was being established by the court.

13. The Probate Court further ruled that, because of the *inter vivos* constructive trust which it had established, Steve did not own the funds and therefore his lifetime gift of the same to his two daughters was void; all Steve owned, per the court's ruling, was an expectancy interest in the funds, as a beneficiary of the trial court's established trust, which that court further ruled had to descend to his heirs pursuant to *MCL 554.35*.

14. This ruling was affirmed on appeal by the Court of Appeals in its published opinion dated June 5, 2014.

15. Application to appeal the decision of the Court of Appeals is now being made to this Court.

ARGUMENT I

DOES NOT THE LAW OF CONSTRUCTIVE TRUSTS REQUIRE FOR THE COURT TO FIND THAT SOMEONE ELSE OWNS THE PROPERTY, BEFORE IT CAN TAKE TITLE AWAY FROM THE ACTUAL LEGAL TITLE HOLDER?

Constructive trust claims are equitable claims. [*Irvin v. Irvin, 93 Mich. App. 770, 286 N.W.2d 920 (1980) - **constructive trust** is a remedial **equitable device** employed to prevent*

injustice, which will only be imposed ***when conscience demands it***. (Emphasis supplied.)]

"The trial court's exercise of its equitable authority is discretionary within the confines of equity jurisprudence and the facts of the particular case (citation omitted), and this Court reviews a trial court's grant of injunctive" (equitable) "relief for an abuse of discretion. (Citation omitted.) The trial court's findings of fact are reviewed for clear error." (Citation omitted.) [*King v. State, 488 Mich. 208, 793 N.W.2d 673 (2010)*] "The determination of the trial court regarding disputed questions of fact will not, and should not, be disturbed, unless it is clear that a wrong conclusion has been reached." (Citation omitted.) [*Rupe v. Cingros, 7 Mich. App. 146, 151 N.W.2d 178 (1967)*]

Appellate courts are required to give due deference to the findings of the trial court, and must sustain those findings unless convinced that, had it heard the evidence in the first instance, it would have been compelled to reach a contrary result. [*Doster v. Estes, 126 Mich. App. 497, 337 N.W.2d 549 (1983)*]

"Constructive trusts are creatures of equity and their imposition makes the holder of legal title the trustee for the benefit of another who in good conscience is entitled to the beneficial interest. They are distinguished from express and resulting trusts in that they do not arise by virtue of agreement or intention, but by operation of law. (Citations omitted.)

Constructive trusts, while infinite in their variety, are imposed only where it would be inequitable to do otherwise." (Citations omitted.) [*Arndt v. Vos, 83 Mich. App. 484, 268 N.W.2d 693 (1978)*] "Constructive trusts are not used to requite obligations imposed by conscience alone. Rather, they are imposed solely where a balancing of equities discloses that it would be unfair to act otherwise." [*Indian Tribes v. U of M Regents, 104 Mich. App. 482, 305 N.W.2d 522 (1981)*] The burden of proof is on the person seeking to establish a constructive trust. (Citations omitted.) (*Grasman v. Jelsema, 70 Mich. App. 745, 246 N.W.2d 322 (1976)*)

In *Olitkowski v. Loan Assn., 302 Mich. 303, 4 N.W.2d 664 (1942)*, the court states:

> **Constructive trusts arise by operation of law to prevent injustice; fraud, active or constructive, is their essential element, and they will arise whenever it becomes necessary to prevent a failure of justice.** Equity will construct a trust where a person gains something he should not be permitted to hold in equity and good conscience through actual fraud, abuse of confidence, or questionable means. A constructive trust arises not from agreement but from operation of equities in order to satisfy demands of justice. A court of equity in decreeing a constructive trust, is bound by no unyielding formula as the equity of the transaction must shape the measure of relief. **A constructive trust is imposed** not because of the intention of the parties but **because the person holding the title to the property would profit by a wrong or would be unjustly enriched if he were permitted to keep the property. Constructive trusts are such as are raised by equity in respect of property which has been acquired by fraud, or where, though acquired without fraud, it is against equity that it should be retained by him who holds it.** (Citation omitted.) (Emphasis supplied.) [See also *Stephenson v. Golden, 279 Mich. 710, 276 N.W. 845 (1937)*]

The prerequisites for the imposition of a constructive trust are 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. [*Indian Tribes v. U of M Regents, supra.; Chapman v. Chapman, 31 Mich. App. 576, 188 N.W.2d 21 (1971); Stephenson v. Golden, supra.; Rancho v. Beach, 254 Mich. 600, 236 N.W. 875 (1931)*]

What actually happens in a constructive trust case is that the "***ownership***" of property is taken away from the legal owner and given to another who the court determines is rightfully entitled to that ownership (the "true" owner, also referred to as the equitable or beneficial owner); this is done to promote justice and prevent an injustice from occurring.

The effect of a court imposed constructive trust is not to have the court actually create an ongoing trust, but rather to convert the legal owner's prior status as owner of the property to that of trustee over the property, for the benefit of the true owner. In *Digby v. Thorson, 319 Mich. 524, 30 N.W.2d 266 (1948)*, the Michigan Supreme Court said:

> Fraud is not necessary to give rise to a constructive trust, but **if circumstances are such as to render it inequitable for the holder of the legal title to retain the same, the court may charge it with a trust in favor of the equitable *owner***. (Emphasis supplied.)

And, in *Kent v. Klein, 352 Mich. 652, 91 N.W.2d 11 (1958)*, a leading and often cited case in the area of constructive trust law, the Supreme Court further said:

> … **the constructive trust is not a trust at all, any more than a quasi-contract is a contract**. (Citation omitted.) **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**.' (Citation omitted.) It arises by operation of law. (Citation omitted.) (Emphasis supplied.)

Of course, this status as trustee is only held by the wrongful legal title holder for the period of time commencing with when he wrongfully acquired that legal title, and continuing until the time the court imposes the constructive trust, which is when the legal title is then judicially given to the true ***owner*** of the subject property. This is made clear from *Stephenson v. Golden, supra.*, where the court said:

> **When it is shown that title 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**, and there are no intervening rights of *bona fide* purchasers, **equity will impress a constructive trust on the property and turn it over to the one to whom it rightfully belongs**. (Emphasis supplied.)

In the present case, while a constructive trust was imposed, and legal title of the monies at issue was taken away from Laura,

the lower Courts did not specify who the true owner of the money was, for whose benefit Laura was deemed to have been holding it as trustee. Rather, the lower Courts, under the guise of constructive trust, actually created a trust for the parties and then presumably made the court created trust the owner of the funds. This is a misapplication of the doctrine of constructive trusts. Courts cannot create trusts (or any other agreements) for parties. [*Martin v. Martin, 37 Mich. App. 208, 211, 194 NW2d 552 (1971) - "Voluntary parole trusts will not be created by the courts, but will only be enforced."*]

Apparently, because the funds were raised for Steve's benefit, he was then presumably designated by the lower Courts as the beneficiary of their created trust. The logical import of this having been done is that these courts believed for Steve to be the true owner of the funds. If they had made this finding, however, then there would have been no basis for using the constructive trust remedy at all, as the evidence was uncontroverted that Steve not only knew and approved of these funds having been titled in Laura's name, with his other daughter Lisa named as payable on death beneficiary, but had actually requested for them to be titled in Laura's name. (TT, p.127)

In *Cerling v. Hedstrom, 51 Mich. App. 338, 214 N.W.2d 904 (1974)* the court refused to establish a constructive trust with regard to a parcel of real estate, and thereby provide an

ownership interest contrary to that established by way of the existing deed. In support of its decision, the court stated:

> **There is nothing ambiguous in the terms of the documents under which the defendant holds title**. If any of the predecessors in title had desired to put the plaintiff, or that class of people for whom he speaks, as owners, jointly, of the real estate, it would have been no problem to have gone to an attorney's office and created such a joint title for the benefit of the plaintiff and the other heirs. The fact that this was not done **shows that the predecessors in title were content with the title as it stood**. (Emphasis supplied.)

This can also be truly stated in the present action. There is nothing ambiguous in the terms of the bank account documents under which Laura held her title. (Defendant's Exhibit 1) Should her father, who was aware of how that title was held, have wanted for it to have been held differently, it would have been very easy for him to have originally requested that it be set up differently, or to have gone to the bank and had it changed; that this was not done, shows he was content with the title as it stood.

Also, in *Grasman v. Jelsema, supra.*, the court refused to establish a constructive trust, stating:

> The evidence presented at trial does not support the plaintiff's contention for imposition of a constructive trust. **The evidence establishes that the various documents executed concerning the property were properly executed to effectuate the intentions of the parties.** There is **no evidence of a breach of a fiduciary or confidential relationship**, mistake, misrepresentation, concealment, undue influence, duress or fraud. (Emphasis supplied.)

This can further be said about the present action as well. There was no evidence presented, or court finding made, of any wrongdoing by Laura, as is necessary to support the imposition of a constructive trust; nor has it been alleged, let alone proven, that the bank documents which were executed were not properly executed so as to have effectuated the intention of Laura and her father, as to the proper ownership of the benefit monies raised.

Therefore, without the lower Courts having identified someone other than Laura as being the proper true owner of the funds, legal title to those funds should have remained with Laura and should not have been taken away from her under a constructive trust theory. And, even if the lower Courts had properly named Steve as the true owner, this would still be the same end result.

ARGUMENT II

IF TITLE TO MONIES RAISED, BY ONE PERSON FOR THE BENEFIT OF ANOTHER, IS, BY WAY OF COURT IMPOSED CONSTRUCTIVE TRUST, GIVEN TO THE PERSON FOR WHOSE BENEFIT THE MONIES WERE RAISED, DOES NOT THAT PERSON THEN HAVE A SUFFICIENT ENOUGH OWNERSHIP INTEREST (EITHER PRESENT OR EXPECTANT) TO BE ABLE TO MAKE A GIFT OF THOSE MONIES?

A. UNDER A CONSTRUCTIVE TRUST PROPERLY IMPOSED.

"Since equity is involved, our standard of review is de novo, with no reversal unless the trial court's findings were clearly erroneous or we conclude that we would have reached a different result had we occupied the lower court's position." (Citation

omitted.) [*Guise v. Robinson, 219 Mich. App. 139, 555 N.W.2d 887 (1996)*]

"Equity jurisprudence 'molds its decrees to do justice amid all the vicissitudes and intricacies of life.' (Citation omitted.) While legislative action that provides an adequate remedy by statute precludes equitable relief, the *absence* of such action does not. This is so because 'every equitable right or interest derives not from a declaration of substantive law, but from the broad and flexible jurisdiction of courts of equity to afford remedial relief, where justice and good conscience so dictate.' (Citation omitted.) Equity allows 'complete justice' to be done in a case by 'adapting its judgments to the special circumstances of the case.'" (Citation omitted.) [*Tkachik v. Mandeville, 487 Mich. 38, 790 N.W.2d 260 (2010)*]

In *Robair v. Dahl, 80 Mich. App. 458, 264 N.W.2d 27 (1978)*, a constructive trust case, the court stated:

> Each case *** must be decided in view of the peculiar circumstances which belong to it and mark its character, and *** **the only safe criterion is the intention of the parties, to be ascertained by considering their situations and the surrounding facts**, as well as the written memorials of the transaction.

If the fundraised monies here at issue had been truly put into the name of someone other than Steve (the person for whose benefit they were raised), or Laura (that person's designee), then the imposition of a constructive trust would have been most

appropriate in this case. And, if a constructive trust remedy was used by the court, it would have resulted in the monies then being turned over to Steve as the true owner of them. As owner, it is axiomatic, that Steve would then have possessed the ability to make a gift of them to his daughters. [See *Sloman v. Cutler, 258 Mich. 372, 374, 242 NW 735 (1932)* - If one's interest in property is absolute, as a fee simple, restriction on his right of alienation is void as repugnant to the grant.]

Therefore, with Steve being found to have made the gift to his daughters, under the proper imposition of a constructive trust in this matter, the funds would have to belong to his daughters.

B. <u>UNDER THE CONSTRUCTIVE TRUST AS IT WAS ACTUALLY IMPOSED</u>.

"This court reviews an award of interest in equity for an abuse of discretion." [*Olson v. Olson, 273 Mich. App. 347, 729 N.W.2d 908 (2006)*] "Questions of statutory interpretation are reviewed de novo. (Citations omitted.) "Clear and unambiguous statutory language is given its plain meaning, and is enforced as written." (Citation omitted.) [*Ayar v. Foodland Distributors, 472 Mich. 713, 698 N.W.2d 875 (2005)*]

By "<u>setting up</u>" a constructive trust in this case, the trial Judge did not "<u>turn the property over</u>" to Steve, and thereby restore and honor his right to deal with it as an owner. Rather, the trial court ruled that Steve was only the beneficiary of its

established trust, and not the legal ***owner*** of the funds at issue, as the law of constructive trusts would have made him. And, the trial Judge further ruled, that Steve, as a beneficiary and not an owner of these funds, could not dispose of them during his lifetime, as a true owner would have been able to do, and as he had actually done per the court's own specific findings of fact.

In this regard, the trial judge stated: "*the* ***decedent was the beneficiary*** *and not the owner* ***of the funds and thus had no power to gift the same during his lifetime.***" (TCD, p.3) The trial court then ruled that Steve only owned an expectant estate in the subject funds, as the beneficiary of the trust which the court had "set up", and said because *MCL 554.35* provides that such estates are "*descendible*", the monies had to pass to his intestate estate at the time of his death. (TCD, p.3) It is clear from this ruling that the trial judge did not determine for the gift Steve had made to his daughters to have been legally insufficient, but rather only that Steve did not possess the legal right to make that gift.

MCL 554.35 simply and clearly reads as follows:

> Expectant estates are descendible, devisable and ***alienable***, in the same manner as estates in possession. (Emphasis supplied.)

Therefore, even if Steve truly only held a remainder interest, i.e. - an expectant estate, in these funds, as the trial court believed, he was still able to gift away that expectant remainder interest at any time, and to whomever, he might desire, just the

same as he could have done had he held a full ownership interest. Why both lower Courts ignored the "*alienable*" language of this statute is unknown, but for them to have done so is clear error.

Steve had just as much legal right, under this statute, to give away his court determined expectancy interest as he did to Will it to someone, or to have it pass to his heirs at law. Therefore, even though the lower Courts erred in their application of the law of constructive trusts, had they nonetheless properly followed this statute, they would have still ended up with the right result; i.e. - the funds belonging to Steve's daughters, Laura and Lisa, per the gift those courts found were made to them.

In that event, such a ruling would have constituted the right result having been reached, albeit for the wrong reason, and it would have been a "no harm - no foul" situation. However, to have erroneously applied both the equitable doctrine of constructive trusts, and the statutory law with regard to the gifting of expectant estates, the lower Courts have instead reached both a wrong and an unjust result, being the very thing that equity abhors; this injustice now needs to be corrected on appeal.

ARGUMENT III

IS THE DELIVERY ELEMENT OF A VALID GIFT MET WHEN THE ITEM GIFTED IS ALREADY IN THE POSSESSION OF THE DONEE AT THE TIME THE GIFT IS MADE?

Courts review questions of law under a de novo standard. *Barrow v. Detroit Election Comm., 301 Mich. App. 404, 411, 836 NW2d 498 (2013)*

There are three elements to a valid gift, whether *inter vivos* or *causa mortis*. They are [1] the donor must possess the intent to gratuitously pass title to the donee; [2] an actual or constructive delivery must be made; and [3] the donee must accept the gift, although when a gift is beneficial to the donee acceptance is presumed as a matter of law. [*Brooks v. Gillow, 352 Mich. 189, 89 N.W.2d 457 (1958); Molenda v. Simonson, 307 Mich. 139, 11 N.W.2d 835 (1943)*]

Although the trial court found that Steve had made a gift of the fundraised monies to his two daughters, it then invalidated that gift on the ground Steve only owned an expectancy interest in those funds, which it said could not be gifted. The Court of Appeals, after accepting the trial court's findings and rulings, and affirming its Decision, nonetheless also said in its Opinion:

> there is no evidence that Stephen made any kind of delivery, not even *de minimus* constructive delivery. That being the case, we must conclude that no valid gift occurred. (p. 4)

It has been the settled law of this State, for nearly the last century, that the element of delivery is met when the property being gifted is in the possession of the donee at the

time the gift is made. *Burt v. Bank of Saginaw, 241 Mich. 216, 223, 217 N.W. 71 (1928)* In *Burt* the court said:

> It must not be overlooked that George, the donee, had possession of the intended gift. Under the circumstances, to show delivery, it is only necessary to show that the donor relinquished dominion over the thing given, and recognized the possession of the donee as being in his own right. (Citations omitted.)

In the last citation the rule is stated:

> **Where property is at the time of the gift in the possession of the donee, *as agent for the donor or otherwise*, it is not necessary that the donee should surrender to the donor his actual possession in order that the latter may redeliver it to him in execution of the gift**, but a relinquishment by the donor of all dominion over the property, and recognition of the possession of the donor (sic) as being in his own right, is sufficient to perfect the gift. (Emphasis supplied.)

This rule was more recently reaffirmed in the case of *Davidson v. Bugbee, 227 Mich. App. 264, 268, 575 N.W.2d 574 (1997)*, wherein the Court, in setting forth the elements of a gift said:

> In order for a gift to be valid, three elements must be satisfied: (1) the donor must possess the intent to transfer title gratuitously to the donee, (2) there must be actual or constructive delivery of the subject matter to the donee, **unless it is already in the donee's possession**, and (3) the donee must accept the gift. (Emphasis supplied.)
>
> [See also *U.S. Four Hundred Seventy Seven (477) Firearms, 698 F. Supp. 2d 894 (E.D. Mich. 3-12-2010)*]

It has never been contested that the gifted monies were at all times in a bank account in the name of Laura, with Lisa named as a payable on death beneficiary of that account. Therefore, at the time Steve gifted those monies to his daughters, they were

already in their possession and the element of delivery was met in accordance with established Michigan case law. For the Court of Appeals to have ruled to the contrary shows either an ignorance of, or a disregard for, this law; either way it constitutes clear error on the part of that Court which now needs to be overruled in order to prevent a Court imposed injustice from occurring.

Even in the absence of this law, it should have been a matter of common sense that the delivery element was met under these circumstances. To require that gifted property in the possession of a donee must be surrendered back to the donor, so the donor can turn around and hand it back to the donee, simply to complete the gift, would be both a superfluous and a senseless requirement.

In addition, because this is an equitable case, the court should have been first and foremost concerned with the doing of equity. And, because it is always the goal of equity to carry out the clear intentions of the owner of property, even if applying the strict requirements of the law would mandate a contrary result, the Court should have honored Steve's clear intent rather than having defeated it thru the application of legal formalities.

That it was Steve's intent for his two daughters to receive this money is very clear from [1] he having told Laura to put it in an account in her name initially (TT, p. 127); [2] he having consented to Lisa being shown as a payable on death beneficiary on that account (TT, p. 127); [3] he having been presented with the

account opening card and regular statements showing for it to be title that way and never objecting (TT, pgs. 127, 249-50); [4] he having allowed for the monies to remain titled in that fashion until the time of his death; and [5] he having specifically stated in the presence of others, just prior to his death, that he was giving these monies to his two daughters (TT, pgs. 140-41, 225, 237-38), as the lower Courts specifically found had occurred.

Therefore, to have truly done equity in this case, even if the Court of Appeals had legitimate concerns about Steve having properly satisfied what it *believed* were the formal legal requirements of a valid gift, it should have awarded the monies at issue to Steve's two daughters anyway, in order to carry out his intentions. Instead, and under the guise of doing equity, both lower Courts did not provide Steve with the equity considerations he deserved, and did not order what they each clearly acknowledged Steve wanted to have done with his money, because of believed legal deficiencies (no legal ownership interest to gift per the trial court, and no legal delivery per the Court of Appeals), which should never be an impediment to a court doing equity, even if they are real, which in this case they clearly were not.

SUMMARY

Bottom line in this case, when the constructive trust issue is taken away and the matter is stripped down to its barest form,

is that Steve made a gift of monies to his two daughters in contemplation of his impending death, which the lower Courts ruled was invalid. Both lower Courts ultimately ruled that Steve was the owner of the gifted monies by having ordered them paid to his estate, after his gift of them was invalidated. The law is quite clear that in order for property to belong in a decedent's estate, it must be owned by that decedent.

Both lower Courts also found for Steve to have made the gift of these monies to his two daughters, but, putting all equities aside, ruled that the gift was legally deficient and invalidated it. The trial court based its invalidation on Steve only holding an expectancy interest, which it ruled was not a sufficient enough ownership interest in the property to allow for him to make a gift of it. That ruling is contrary to law and clearly erroneous. It totally ignores *MCL 554.35*, which specifically allows for an expectancy interest in property to be gifted.

The Court of Appeals, in affirming both the findings and the rulings of the trial court, agreed with and approved of the above reason given for Steve's gift having been invalidated; making its decision also clearly erroneous by being directly contrary to the clear mandate of *MCL 554.35*. The Court of Appeals did not stop there however, and in what appears to be somewhat of a "protection" ruling (it was not made clear whether this was done to bolster or replace the trial court's invalidation ruling), the

Court of Appeals went further and said "*In any event*", the gift was invalid because the legal element of delivery, actual or constructive, was missing.

This, however, is also itself a clearly erroneous ruling because the long standing case law in this State (and others) is that the legal element of delivery is met when the item being gifted is already in the possession of the donee at the time the gift is made. (See *Burt v. Bank of Saginaw, supra*. and *Davidson v. Bugbee, supra*.) In this case the monies gifted were in an account title in the name of Laura (hence in her possession) when Steve made his gift of them to her, to be split between herself and her sister and used for their schooling. (TT, pgs. 127, 141)

Laura and Lisa have had to watch their father die a premature death, incur the wrath of a short term step-mother, suffer through a bogus criminal investigation initiated by that step-mother, and then be subjected to civil litigation by that same step-mother who is trying to take back from them the only thing they received from their father when he passed (being the remaining monies they themselves had raised to help him fight his battle with cancer so he might have a little more time to spend with them). They believed justice would be achieved thru the court system and have spent a lot of time, money, and emotional energy in that quest.

While these sisters would have been much better able to accept the negative result received, had the Decisions providing

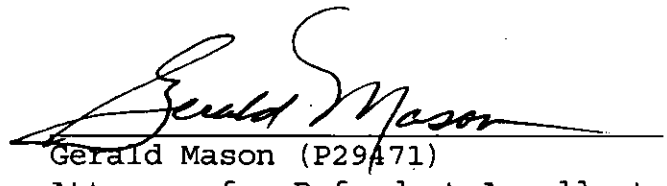
and affirming that result reasonably shown to them that the law and/or the equities of the case were actually against them, those Decisions do not do that. Rather those Decisions show them that the Courts either do not know the law or have chosen, for reasons unexplained, not to follow it. These young ladies honestly expected, and they surely deserved, much more from the judicial system than what they have thus far received.

It is now their extreme hope, by availing themselves of this final attempt allowed, that they will either receive the justice they have been so desperately seeking, or at least a well-reasoned and legally sound explanation as to why what they have already received is in fact all of the justice which they are entitled to. This does not seem to be too much for them to ask for.

RELIEF REQUESTED

It is respectfully requested, pursuant to *MCR 7.302(H)(1)*, that this court either grant the Defendant/Appellant's Application for Leave to Appeal; enter a final decision correcting the clear errors committed by the lower Courts; or enter a peremptory order reversing the Decision of the Court of Appeals and directing for Defendant/Appellant to have Judgment entered in her favor.

Dated: 7/15/14



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