

NOTICE

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2016 IL App (4th) 150162-U

NO. 4-15-0162

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

January 19, 2016

Carla Bender

4th District Appellate

Court, IL

CONNIE JOHNESSEE, DOROTHY SMITH, BRENDA)
JOHNSON, and JOE SCHNEPF,)
Plaintiffs-Appellees,)

v.)

JOHN SCHNEPF and RAYMOND SCHNEPF,)
Individually and as Successor Trustee of the MALETA)
MAXINE SCHNEPF FEBRUARY 2001 TRUST,)
Defendants-Appellants,)

and)

LYNDLE SCHNEPF and CAROLYN SHAFFER,)
Defendants.)

) Appeal from
) Circuit Court of
) Pike County
) No. 09MR47

) Honorable
) Thomas J. Brannan,
) Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Knecht and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court had jurisdiction over plaintiffs' complaint as plaintiffs were not attempting to set aside or contest the validity of the Trust.

(2) Defendants failed to establish the trial court erred in not allowing defendants to raise an affirmative defense the Trust was amendable as a conventional trust after this court's decision in *Johnessee v. Schnepf*, 2012 IL App (4th) 110767, 975 N.E.2d 1090.

(3) Defendants failed to establish the trial court erred in dismissing their counterclaim for the establishment of a constructive trust.

¶ 2 After this court remanded this case to the trial court in *Johnessee v. Schnepf*, 2012

IL App (4th) 110767, 975 N.E.2d 1090, that court made a series of rulings in this complicated

case which are the subject of this appeal. Defendants John Schnepf and Raymond Schnepf

appeal, raising the following issues: (1) count I of plaintiffs', Connie Johnessee, Dorothy Smith, Brenda Johnson, and Joe Schnepf, complaint for declaratory judgment should have been dismissed pursuant to section 8-1 of the Probate Act of 1975 (Probate Act) (755 ILCS 5/8-1(f) (West 2012)); (2) the court erred by failing to find the Maleta Maxine Schnepf February 2001 Trust (Trust) was modifiable as a conventional trust; and (3) the court erred by not establishing a constructive trust for the property Maleta placed in the Trust in 2005 after the attempted amendment to the Trust. We affirm.

¶ 3 I. BACKGROUND

¶ 4 As the parties are familiar with the facts in this case, we only summarize the facts necessary for our decision. On February 1, 2001, Maleta Maxine Schnepf established the Trust, which was funded with real property. On May 12, 2005, Maleta signed documents which attempted to modify the Trust by removing plaintiffs as named beneficiaries of the Trust. On that same day, Maleta executed her last will and testament (Will). In addition, Maleta deeded additional farmland to the Trust.

¶ 5 Maleta died on July 31, 2008. Her probate estate was opened on August 5, 2008. On December 28, 2009, plaintiffs filed their complaint challenging the validity of Maleta's 2005 modification to the Trust.

¶ 6 In August 2010, the trial court found the Trust was an amendable land trust. The court granted Raymond Schnepf's motion for summary judgment to the extent the Trust was an Illinois land trust and fully amendable during Maleta's lifetime. *Johnessee v. Schnepf*, 2012 IL App (4th) 110767, ¶¶ 12-15, 975 N.E.2d 1090.

¶ 7 Although issues were still pending, plaintiffs appealed pursuant to the trial court's Rule 304(a) finding. *Id.* ¶ 18. On appeal, this court reversed, finding the Trust was not an

amendable land trust. This court remanded the case to the trial court for further proceedings, directing the court to reconsider plaintiffs' motions for judgment on the pleadings and summary judgment. This court did not address any of the trial court's other findings as those findings were based on the trial court's ruling the Trust was an amendable land trust. *Id.* ¶ 41-42.

¶ 8 On June 13, 2012, defendant Raymond Schnepf, individually and as successor trustee to the Trust, requested leave to file an amended answer to count I of plaintiff's complaint. Raymond included the following affirmative defenses in his proposed answer. First, for purposes of preserving the issue for supreme court review, if necessary, Raymond alleged the Trust was fully amendable as an Illinois land trust. Second, Raymond alleged the Trust was amendable by implication as a conventional trust. Raymond acknowledged the Trust did not expressly reserve the power to alter, amend, modify, or revoke. However, Raymond stated a trust, which is silent on the issue of amendability/revocability, can be amended or revoked if the trust can be interpreted to allow modification. According to Raymond's allegations, the fact Maleta retained extensive interests in the Trust showed she intended the trust to be amendable/revocable.

¶ 9 On August 23, 2012, the trial court issued an order, stating the appellate court had ruled the Trust was not amendable. According to the trial court:

"Though the specific issue before this Court is whether or not the Court should allow Defendant Raymond Schnepf[']s] *** Motion for Leave to File an Amended Answer to Count I of the Complaint herein, the Court would be remiss if the Court did not consider the consequence if the Motion is allowed. This Court agrees with Plaintiff[s'] Counsel that effectively, Defendant's

intended Amended Answer to Count I seeks to relitigate the issue that has already been decided by the Appellate Court."

Pursuant to this court's direction to reconsider plaintiffs' motions for judgment on the pleadings and summary judgment, the trial court ordered plaintiffs to set their motions for hearing. The court denied defendant's motion for leave to file an amended answer to count I of plaintiffs' complaint.

¶ 10 On September 28, 2012, Raymond filed a motion to dismiss pursuant to section 2-619(a)(5) of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-619(a)(5) (West 2012)). According to Raymond, plaintiffs filed their complaint challenging the terms of the modified trust "more than ten months after the last day allowed for such contests" under section 13-223 (735 ILCS 5/13-223 (West 2012)). That same day, Raymond and John Schnepf filed a motion for leave to file a counterclaim to establish a constructive trust.

¶ 11 On October 25, 2012, plaintiffs filed an objection to defendants' request for leave to file a counterclaim. Plaintiffs argued the counterclaim was not timely and further was a "desperate attempt to delay the carrying out of the appellate court opinion that the [T]rust is not amendable."

¶ 12 On October 26, 2012, the trial court entered an order denying defendant's motion to dismiss based on the statute of limitations. The court also heard arguments on plaintiffs' motion for judgment on the pleadings, which the court took under advisement.

¶ 13 On November 28, 2012, the trial court heard arguments on defendants' motion for leave to file a counterclaim and plaintiffs' motion for summary judgment.

¶ 14 On December 31, 2012, the trial court issued an order, which included several rulings. First, the court found defendants waived their argument plaintiffs' complaint was not

filed within the applicable statute of limitations. Further, regardless of waiver, the court also found section 13-223, upon which defendants based their motion to dismiss, did not apply because plaintiffs were not attempting to set aside or contest the Trust. The court granted defendants leave to file their counterclaim for a constructive trust. Finally, the court granted plaintiffs' motion for judgment on the pleadings, except the court found its judgment did not apply to the real property Maleta deeded into the Trust in 2005, which was the land at issue in defendants' request for a constructive trust.

¶ 15 On January 14, 2013, defendants filed their counterclaim seeking a constructive trust. According to the counterclaim, Maleta deeded property into the Trust in 2005 based on a "mistaken belief" as to the validity of her modification of the Trust. On February 13, 2013, plaintiffs filed a motion to dismiss defendants' counterclaim. That same day, plaintiffs filed an alternate motion to dismiss or strike the counterclaim or portions thereof.

¶ 16 On June 3, 2013, the trial court issued an order dismissing the counterclaim. The court stated:

"The real issue is whether or not the counterclaim, which seeks to establish a constructive trust, should be allowed. Plaintiffs argue the Statute of Limitations has run, and in any event, there is an adequate remedy at law. Defendants argue that the Plaintiffs have waived their right to assert the five year limitation period and that there is no adequate remedy at law, and therefore the Court should establish a constructive trust."

The court found plaintiffs waived the statute of limitations defense. The court noted Maleta, in 2005, deeded the property at issue to the Trust, not the Trust as amended. Further, the court

stated it reviewed the supreme court's opinions in *Darst v. Lang*, 367 Ill. 119, 10 N.E.2d 659 (1937), and *Smithburg v. IMRF*, 192 Ill. 2d 291, 735 N.E.2d 560 (2000). According to the court:

"In *Darst*[,] parents had deeded certain real estate to their daughter but had inadvertently not reserved a life estate. Though there was conflicting testimony, it was found that the parents as well as the daughter had understood that the rents and entitlements were reserved to the parents for their lifetimes. The Court allowed a reformation.

The Court has also considered [*Smithburg*], and while the Court agrees in *Smithburg* it is stated[,] 'For example, a constructive trust may be imposed in the case of mistake, although no wrong doing is involved.' P. 565 (citations omitted), the Court went on to state[,] 'A constructive trust is created when a court declares that the party in possession of *wrongfully* (emphasis added) acquired property the constructive trustee of that property because it would be inequitable for the party to retain possession of it.' P. 566[.] In the case before this Court, there is no evidence or indication of any wrongdoing.

It should be noted, in *Smithburg*, the issue was insurance proceeds that, by agreement of the Smithburgs when they were divorced, were to go to Mrs. Smithburg. The Court held in that case that a constructive trust was appropriate and in part, noted that

if for no other reason, a court has the inherent power to enforce its orders.

*In the instance before this Court, Plaintiffs' argument in relation to estates is persuasive. If we adopt Defendants' argument, each time a potential beneficiary in an estate does not inherit what *** they 'should have', is the potential beneficiary entitled to a constructive trust if he or she can prove that the decedent or decedent's attorney that drafted the will failed to make provision for the claimant, as the decedent intended?" (Emphasis added.)*

The court found a constructive trust should not be imposed. The court noted defendants have, or had, an adequate remedy at law, *i.e.*, a malpractice lawsuit against the attorney who prepared the Trust and the invalid amendment to the Trust. As a result, the court dismissed defendants' counterclaim.

¶ 17 On June 21, 2013, defendants filed a motion to reconsider the trial court's dismissal of their counterclaim. Defendants argued Illinois courts have allowed constructive trusts where a party was mistaken about his or her antecedent legal rights. Defendants argued:

"At the time Maleta Schnepf executed the second deed in trust she thought that the 2001 trust had been properly amended to reflect her current wishes. Because of the Appellate Court's unexpected ruling years after the 2005 deed was executed, Maleta's reliance on her perceived legal rights was mistaken. ***

The final factor which loudly and clearly calls out for the requested relief is the 'equity of the transaction'. This is not a case where the uncorroborated allegations of a disgruntled heir or beneficiary are the foundation for the request. Here we have tangible, documentary evidence as to what Maleta Schnepf intended when she executed the 2005 deed in trust. She wanted to benefit Raymond and John Schnepf, but even more emphatically, she did not want Lyndle Schnepf to derive any benefits from the land conveyed by the second deed. ***

* * *

There can be no question as to what Maleta Schnepf wanted to accomplish when she executed the second deed in trust. Equity must step in and make it so."

Defendants went on to argue they had no adequate remedy at law.

¶ 18 On August 23, 2013, the trial court denied defendants' motion to reconsider the dismissal of their counterclaim. The court stated in part:

"In arguing for [r]econsideration, Defendants argue that a constructive trust is appropriate when there is a mistake of law. In fact, on page 3 of Defendant's [m]otion to [r]econsider, it is stated '...Maleta's reliance on her perceived legal rights was mistaken...' Plaintiffs counter, contending that generally, for a constructive trust there must be a mistake of fact, not of law. This Court believes the consensus of the law now is that there must be a

mistake of fact, not of law. Even by Defendant's pleading,
Maleta's mistake, if any, was one of law."

Further, the court found any mistake in this case lacked mutuality. The court denied defendants' motion to reconsider.

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 Defendants contend the trial court erred in the following ways. First, count I of plaintiffs' complaint should have been dismissed for failure to comply with section 8-1(f) of the Probate Act (755 ILCS 5/8-1(f) (West 2012)). Second, count I should have been dismissed because the Trust was fully amendable as a conventional trust. Finally, assuming the Trust could not be amended, the court should have established a constructive trust for the property placed into the Trust after Maleta attempted amendment.

¶ 22 A. Trial Court's Jurisdiction

¶ 23 Defendants first argue the trial court should have dismissed count I of plaintiffs' complaint pursuant to section 8-1(f) of the Probate Act. According to defendants, the court did not have jurisdiction over plaintiffs' claim because the claim was not filed in a timely manner pursuant to section 8-1(f), which provides:

"(f) An action to set aside or contest the validity of a revocable inter vivos trust agreement or declaration of trust to which a legacy is provided by the settlor's will which is admitted to probate shall be commenced within and not after the time to contest the validity of a will as provided in subsection (a) of the Section and Section 13-223 of the Code of Civil Procedure." *Id.*

Section 8-1(a) states:

"(a) Within 6 months after the admission to probate of a domestic will in accordance with the provisions of Section 6-4, or of a foreign will in accordance with the provisions of Article VII, any interested person may file a petition in the proceeding for the administration of the testator's estate or, if no proceeding is pending, in the court in which the will was admitted to probate, to contest the validity of the will." 755 ILCS 5/8-1(a) (West 2012).

Our supreme court has held "[t]his six-month limitation period [for a will contest] is jurisdictional and not subject to tolling by fraudulent concealment or any other fact not expressly provided for by the Probate Act." *In re Estate of Ellis*, 236 Ill. 2d 45, 50, 923 N.E.2d 237, 240 (2009).

¶ 24 The trial court did not address this specific issue because it was not raised. However, because the supreme court in *Ellis* found the six-month period a jurisdictional requirement, we address the issue. While not considering the applicability of section 8-1(f), the court did find the limitation period found in section 13-223 of the Procedure Code inapplicable because plaintiffs did not seek to set aside or contest the validity of the Trust. We agree with the court's assessment and for the same reason find section 8-1(f) inapplicable to the situation here.

¶ 25 Defendant's reliance on *In re Estate of Feinberg*, 2014 IL App (1st) 112219, 6 N.E.3d 310, is misplaced because the facts here are distinguishable. In this case, plaintiffs argued the Trust could not be amended. As a result, consistent with the trial court's finding, plaintiffs were trying to ensure the integrity of the Trust by arguing the 2005 attempted amendment was a nullity. In *Feinberg*, the appellate court held that case was essentially a trust

contest. However, the issue in that case was not whether the trust could be amended. Instead, the challenge was to the validity of an amendment because it had been drafted by a non-lawyer. *Id.* ¶ 24. In the case *sub judice*, plaintiffs claimed the original Trust could not be amended, not that the method of amendment was somehow improper.

¶ 26 B. Amendability as a Conventional Trust

¶ 27 Defendants also argue the trial court erred in refusing to allow defendants to raise an affirmative defense that the Trust was amendable as a conventional trust. According to defendants, this could be remedied by remanding the case to the trial court, but defendants ask us to simply look at the Trust and determine as a matter of law whether it was fully amendable as a conventional trust.

¶ 28 However, the issue before this court is whether the trial court erred in not allowing defendants to pursue this new affirmative defense on remand from this court, not whether the Trust was fully amendable as a conventional trust. This court has stated:

"Ordinarily, an affirmative defense that is not pled is forfeited. [Citation.] However, a trial court may within its discretion allow a party to amend its pleadings at any time before final judgment is entered. [Citation.] We will not reverse a court's allowance of such an amendment absent an abuse of discretion. [Citation.] 'The test as to whether that discretion has been properly exercised is whether the amendment furthers the ends of justice.' [Citation.] Relevant considerations include whether the amendment surprises or prejudices an adverse party." *Ulm v. Memorial Medical Center*, 2012 IL App (4th) 110421, ¶ 51, 964 N.E.2d 632.

¶ 29 According to defendants, the trial court believed this court's prior opinion held the Trust was not amendable under any theory. Defendants argue this court's prior opinion only held the Trust was not an amendable land trust, and they should have been given the opportunity to argue the Trust was amendable as a conventional trust. In its written order, the trial court stated it agreed with plaintiffs' counsel that allowing defendants to amend their answer would effectively relitigate an issue already decided by the appellate court.

¶ 30 We hold the trial court did not abuse its discretion in denying defendants' request to allow this additional affirmative defense. Plaintiffs' case was filed on December 28, 2009. Defendants did not try to add this affirmative defense until after this court reversed the trial court and remanded the case for further proceedings.

¶ 31 Defendants attempt to rely on an exchange between Justice Steigmann and defense counsel during oral argument in the initial appeal regarding whether defendants had a fallback position should the appellate court conclude the Trust was not an Illinois land trust. Defense counsel responded Maleta's intent to be able to modify, amend, or revoke the Trust could be implied from the language of the Trust even if the Trust was not considered a land trust.

¶ 32 Defendants could have raised this alternative defense at the same time they argued this was an amendable land trust. Instead, they waited 2 1/2 years and attempted to raise the issue after this court held the trial court erred in finding this was an amendable land trust. Justice Steigmann's question in no way mandated the trial court to allow defendants to raise this new affirmative defense on remand.

¶ 33

C. Constructive Trust

¶ 34 Defendants next argue the trial court should have established a constructive trust for the property Maleta deeded into the Trust in 2005 after her attempt to amend the Trust.

According to defendants' brief:

"Once the trial court held that the 2005 modification was invalid, it had the ability to still fulfill Maleta's intent, but chose not to. Without a constructive trust, the absurd and unconscionable result will be that Lyndle Schnepf, who was to be disinherited by his mother, will instead acquire an additional interest in farm property deeded into the Trust in 2005.

In rejecting Defendants' prayer for a constructive trust, the trial court offered several rationales, none of which are supportable by the facts or law."

¶ 35 Defendants' brief appears to confuse the procedural posture of this issue on appeal. As their notice of appeal makes clear, defendants appealed from the trial court's June 3, 2013, order dismissing their counterclaim. However, in their brief, defendants make no argument why (1) the dismissal order should be reversed and (2) they should be able to pursue the counterclaim. Instead, defendants argue this court should impose a constructive trust. In essence, defendants' argument is they are entitled to a constructive trust as a matter of law, which is far from the case. As a result, we hold defendants have forfeited any argument the trial court erred in dismissing their counterclaim. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 36 Even if we treated defendants' argument as attacking the trial court's dismissal order instead of arguing it was entitled to a constructive trust as a matter of law, defendants

provided this court with an insufficient analysis as to why they stated a valid cause of action for a constructive trust. As this court has said on other occasions, it is not a depository unto which an appellant can dump the burden of argument and research. *Elder v. Bryant*, 324 Ill. App. 3d 526, 533, 755 N.E.2d 515, 522 (2001); *In re Austin C.*, 353 Ill. App. 3d 942, 948, 823 N.E.2d 981, 986 (2004); *People ex rel. Illinois Department of Labor v. E.R.H. Enterprises*, 2013 IL 115106, ¶ 56, 4 N.E.3d 1.

¶ 37 Instead of providing this court with analysis as to why a constructive trust could be imposed in this case as a matter of law based on the allegations in their counterclaim, defendants pick apart the trial court's reasoning. However, the court's reasoning is not binding on the reviewing court. This court can affirm a dismissal if proper, even if the trial court's reasoning is incorrect. *Akemann v. Quinn*, 2014 IL App (4th) 130867, ¶ 21, 17 N.E.3d 223.

¶ 38 With regard to constructive trusts, our supreme court has stated:
"A constructive trust is created when a court declares the party in possession of wrongfully acquired property as the constructive trustee of that property [citation], because it would be inequitable for that party to retain possession of the property. ***

A constructive trust is generally imposed in two situations: first, where actual or constructive fraud is considered as equitable grounds for raising the trust and, second, where there is a fiduciary duty and a subsequent breach of that duty. [Citations.] A constructive trust may also arise when duress, coercion or mistake is present. [Citation.] Some form of wrongdoing is a prerequisite

to the imposition of a constructive trust." *Suttles v. Vogel*, 126 Ill. 2d 186, 193, 533 N.E.2d 901, 904-05 (1988).

In this case, defendants' counterclaim alleged the property Maleta deeded into the Trust in 2005 should be placed in a constructive trust because Maleta mistakenly believed she had amended the Trust prior to deeding the property.

¶ 39 In *Smithburg*, 192 Ill. 2d at 299, 735 N.E.2d at 565, the supreme court stated: "Although some form of wrongdoing is generally required for the imposition of a constructive trust [citation], wrongdoing is not always a necessary element [citations]. For example, a constructive trust may be imposed in the case of mistake, although no wrongdoing is involved."

Because defendants are relying on Maleta's alleged mistake to justify a constructive trust in this case, they argue no wrongdoing is required and criticize the trial court for believing wrongdoing was required.

¶ 40 However, even if we accepted this argument, this does not establish the trial court erred by dismissing defendant's counterclaim. The court held Maleta's mistake in this case was a mistake of law—not a mistake of fact—and, therefore, could not be the basis of a constructive trust. Defendants do not argue this was not a mistake of law. In addition, defendants provide no analysis explaining why a constructive trust can be based on a mistake of law.

¶ 41 As stated earlier, an appellant may not dump the burden of argument and research on this court. *Elder*, 324 Ill. App. 3d at 533, 755 N.E.2d at 522; *Austin C.*, 353 Ill. App. 3d at 948, 823 N.E.2d at 986; *E.R.H. Enterprises*, 2013 IL 115106, ¶ 56, 4 N.E.3d 1. We will examine this issue no further.

III. CONCLUSION

¶ 42

¶ 43

For the reasons stated, we affirm the trial court's judgment.

¶ 44

Affirmed.