

IN THE ELEVENTH JUDICIAL CIRCUIT **FILED**
STATE OF MISSOURI

FEB 25 2016

LEAH E. DAY, and
MAARIAH L. DAY

Plaintiffs,

vs.

PAMELA HUPP, and
MARK HUPP

Defendants.

JUDY ZERR
CIRCUIT CLERK
ST. CHARLES CO.

Case 1411-CC00329

Division 1

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The Court conducted a two-day non-jury "bench" trial in this case on January 19 and 20, 2016. The case was submitted on Plaintiff's Second Amended Petition. The Plaintiffs appeared in person and through their attorneys David T. Butsch and Christopher E. Roberts. The Defendants appeared in person and through attorneys Michael R. Hanson and Michael J. Kruse. Evidence was adduced and arguments were made. The Court took the case under advisement on February 12, 2016 at which time the parties had filed their proposed findings of fact, conclusions of law and judgments.

The Court has accepted some of the testimony of each witness as credible and has rejected other parts of the testimony of some witnesses as not credible. The findings made by this Court are consistent with the Court's determination of the credibility of the evidence presented, including the testimony of the witnesses. Upon demand of the defendants the Court now submits this Findings of Fact, Conclusions of Law and Judgment. For clarity the Court will sometimes refer to persons by their first names. The Court intends no disrespect.

FINDINGS OF FACT

1. The Plaintiff, Leah E. Day, is an individual who at all time relevant hereto was a resident of the State of Missouri;

2. The Plaintiff, Mariah L. Day, is an individual who at all times relevant hereto was a resident of the State of Missouri;

3. The Defendant, Pamela Hupp is an individual who at all times relevant hereto was a resident of the State of Missouri;

4. The Defendant, Mark A. Hupp is an individual who at all times relevant hereto was a resident of the State of Missouri;

5. The Plaintiffs are siblings and are the only children of Elizabeth K. Faria (hereinafter sometimes referred to as "Betsy");

6. The Defendants are husband and wife;

7. On the 7th day of April, 2014, the Plaintiffs filed this lawsuit against the Defendant Pamela Hupp;

8. On the 19th day of August, 2014, the Plaintiffs' Amended their Petition to name the Defendant, Mark A. Hupp as a Defendant herein;

9. On the 26th day of August, 2014, the Plaintiffs' dismissed the Defendant Mark A. Hupp as a Defendant herein;

10. On the 10th day of November, 2014, the Plaintiffs' filed their Second Amended Petition to again name Mark A. Hupp as a Defendant in this matter;

11. On the 27th day of December, 2011, Betsy Faria was murdered in her home in Lincoln County, Missouri;

12. Betsy Faria died intestate;

13. At the time of her death Betsy Faria was a resident of the State of Missouri;

14. At the time of her death Betsy Faria was married to Russ Faria;
15. At some time prior to the 23rd day of December, 2011, Betsy Faria purchased a life insurance policy through State Farm Life Insurance Company, bearing policy number LF-1915-3309 with a death benefit of \$150,800.00 (hereinafter the "policy");
16. Said insurance policy insured the life of Betsy Faria and originally named her husband, Russ Faria, as the primary beneficiary;
17. On the 23rd day of December, 2011, Betsy Faria executed a Change in Beneficiary Designation Form wherein Betsy Faria changed the primary beneficiary of said life insurance policy from her husband, Russ Faria, to the Defendant, Pamela Hupp. (Plaintiffs' Exhibit 1 and Defendants' Exhibit A).
18. Said Change in Beneficiary Designation Form designates the Defendant, Pamela Hupp, as the primary beneficiary under said life insurance policy, and further no contingent or secondary beneficiaries were named;
19. Said Change in Beneficiary Designation Form did not contain any language restricting the Defendant's use of the life insurance proceeds upon the death of the insured, Betsy Faria;
20. At the time of her death Betsy Faria owned another life insurance policy issued through Mutual of Omaha. Neither of the Plaintiffs were named as a beneficiary thereunder;
21. Following Betsy Faria's death her husband, Russ Faria, was convicted of her murder;
22. Russ Faria was later granted a new trial and in November of 2015 Russ Faria was acquitted of the murder of Betsy Faria;
23. To date Russ Faria has not filed a motion to intervene in this matter and is not a necessary party to this action;
24. Betsy Faria was survived by three siblings, Pamela Welker, Julie Swaney and Mary Rodgers;

25. Betsy had, for some time been battling breast cancer and that in approximately October of 2011, Betsy was diagnosed with "stage 4" breast cancer and was told by medical doctors that her illness was terminal. (testimony of Pamela Welker);

26. Pamela Welker did not know either of the Defendants and she did not know anything about any life insurance proceeds until after the death of her sister Betsy Faria. (testimony of Pamela Welker);

27. Pamela Welker testified that on the 28th day of December, 2011, Pamela Welker had a conversation with the Defendant Pamela Hupp, wherein Pamela Hupp informed her that Betsy Faria told Pamela Hupp that said life insurance proceeds were to be "used for the kids" and that she (Betsy) "wanted the girls to be taken care of";

28. Pamela Welker did not testify with respect to specific facts, if any, as to what Pamela Hupp meant when stating that the life insurance proceeds were to be used "for the kids" or for the "girls to be taken care of";

29. Bobbi Wann testified via her videotaped deposition and the written transcription of said deposition was received into evidence;

30. Bobbi Wann is a very good friend of Betsy Faria's Mother, Janet Meyer. Bobbi previously resided in the State of Missouri but moved to the State of California in the early 1970's, and that she visited St. Louis regularly. When she visited the St. Louis area she would visit with Janet Meyer and her children including Betsy Faria. (testimony of Bobbi Wann)

31. Bobbi Wann was visiting St. Louis on December 27, 2011, and during said visit she attended Betsy Faria's last chemo-therapy session with Betsy Faria. (testimony of Bobbi Wann);

32. Bobbi Wann testified that, on the 27th day of December, 2011, she overheard a conversation between Defendant Pamela Hupp and Betsy Faria wherein she heard Betsy tell Defendant Pamela Hupp that Betsy wanted her husband, Russ Faria, removed as the beneficiary under the State Farm Life Insurance policy and that Betsy "wanted to make sure the

girls would get the money";

33. On the first day of August, 2014, Bobbi Wann executed an Affidavit wherein she states that on the 27th day of December, 2011, she was with Betsy Faria and Defendant Pamela Hupp and overheard the conversation between Betsy Faria and Pamela Hupp and that during said conversation Betsy Faria told the Defendant Pamela Hupp that she did not want the life insurance proceeds to go to her husband, Russ Faria, and "that she (Betsy) emphasized that she wanted her daughters....to be taken care of";

34. Bobbi Wann did not testify with respect to specific facts, if any, concerning what Betsy Faria may have wanted or intended, if anything, when Betsy Faria stated that "she wanted the girls to be taken care of" or when stating that she wanted to "make sure the girls would get the money."

35. Julie Swaney was Betsy Faria's sister. She knew the Defendant Pamela Hupp through her sister Betsy and knew that Betsy and Pamela Hupp were friends. (testimony of Julie Swaney);

36. Julie Swaney testified that following Betsy Faria's death she had a conversation with the Defendant, Pamela Hupp, and that Pamela Hupp told her that all of the life insurance proceeds had been donated to charity;

37. Julie Swaney did not testify about any conversations that she had with Betsy Faria regarding the life insurance benefits or what, if anything, was to be done with them. Therefore Julie Swaney did not provide any specifics to the Court as to what Betsy meant by "wanting the girls to be taken care of;"

38. Betsy Faria had some concerns with her daughters, the Plaintiffs, with respect to the abuse of illegal drugs, stealing and irresponsibility. Although Mariah was only 17 and Leah was 21, neither of Plaintiffs resided with Betsy Faria at the time of her death. Leah was living with her boyfriend and Mariah was living with Julie Swaney. (testimony of Julie Swaney). At the time of trial, Leah was living with Betsy's mother Janet Meyer. (testimony of Janet Meyer);

39. Betsy Faria worked for State Farm Insurance Company "for several years".
(testimony of Julie Swaney);

40. Betsy Faria and Pamela Hupp knew each other from working at State Farm Insurance Company. (testimony of Julie Swaney);

41. Janet Meyer was the mother of Betsy Faria. Janet knew Pamela Hupp through her daughter Betsy. (testimony of Janet Meyer);

42. Janet Meyer testified that she had a conversation with the Defendant Pamela Hupp in January of 2012 and during said conversation the Defendant Pamela Hupp stated to her that the "the money was supposed to go to the girls";

43. Janet Meyer did not testify as to any specifics with respect to how "the money" was supposed to "go to the girls" or when the "money was supposed to go to the girls";

44. On the 23rd day of December, 2011, Lauren Manganelli was employed at the Winghaven Branch of the St. Charles City-County Library District. (testimony of Lauren Manganelli);

45. While working at said library on December 23, 2011, Betsy Faria and the Defendant Pamela Hupp came into said library. Laura Manganelli served as a witness to the execution by Betsy of the Change in Beneficiary Designation Form. (testiomony of Lauren Managanelli);

46. Lauren Manganelli testified that she heard a conversation between the Defendant Pamela Hupp and Betsy Faria and that she believes, but was not certain, that it was the Defendant Pamela who stated that Betsy Faria was making the Change in Beneficiary Designation because she "did not want the money going to her husband" whom she was divorcing;

47. Lauren Manganelli testified that she only remembers that the Defendant Pamela Hupp and Betsy Faria were talking about life insurance proceeds and only recalled Betsy Faria talking about having children but does not remember Betsy saying anything about using the

insurance proceeds for said children;

48. Rita Wolf was a good friend of Betsy Faria's from high school. Shortly after her diagnoses with breast cancer Betsy Faria contacted her and asked her to be the beneficiary of her life insurance policy but that she declined and told Betsy that she (Betsy) should name one of her sisters as the beneficiary. (testimony of Rita Wolf);

49. Rita Wolf further testified that she and Betsy had, prior to Betsy's death, spoken about the life insurance proceeds and that Betsy Faria "wanted the girls to be taken care of." Rita stated that she and Betsy discussed the possibility of establishing goals for the daughters and/or milestones to achieve in order to receive any money. Rita Wolf could not recall any specific goals or milestones and could not produce a copy of the list Betsy made;

50. Rita Wolf was not present and had no communication with Betsy Faria at the time she signed the Change of Beneficiary Designation Form to designate Pamela Hupp as the sole beneficiary of the State Farm Life Insurance policy. (testimony of Rita Wolf);

51. Rita Wolf did not testify as to any specifics as to what Betsy Faria may have meant by the phrase "wanted the girls to be taken care of";

52. On or about the 25th day of June, 2012, Lincoln County Sheriff Detective Ryan McCarrick conducted an interview of Pamela Hupp. During said interview, Detective McCarrick and Defendant Pamela Hupp discussed Pamela Hupp creating a living trust and depositing the life insurance proceeds into the trust for the benefit of the Plaintiffs because the trust not having been set up yet is "huge in this case, obviously". (testimony of Ryan McCarrick and video recording of interview)

53. Detective McCarrick further stated to Defendant Pamela Hupp that "you ("Pamela") have this money and have not turned any of this money over to the family or the kids... That's a huge problem. Not saying that – I'm not telling you you've got to do that. I'm just telling you that that's going to be a huge issue of doubt in court";

54. After the interview with Detective McCarrick, and before the criminal trial of Russ

Faria, Pamela Hupp created a revocable living trust in conformity with Detective McCarrick's suggestions;

55. In November of 2013, Russ Faria was convicted of murdering his wife, Betsy Faria. Shortly after Russ Faria's murder conviction, Pamela Hupp revoked the revocable living trust. There was no evidence that at any time after the revocation of the living trust there was any further investigation by Detective McCarrick, or any other law enforcement officer, or contact with Pamela Hupp with respect to the revocation of the living trust;

56. Leah Askey, the elected Prosecuting Attorney for Lincoln County, Missouri, had a meeting with the Pamela Hupp on the 27th day of May, 2015. Pamela Hupp appeared for the meeting and brought with her to the meeting a bag full of cash. Askey was unsure how much cash was in the bag or whether the cash in the bag was "the actual" life insurance proceeds from the State Farm Life Insurance Policy in question. (testimony of Leah Askey);

57. Pamela Hupp met Betsy Faria through their mutual employment with State Farm. Pamela Hupp moved to Missouri around 2001 at which time she began employment with State Farm and subsequently was trained in the sale of life insurance products under the supervision of Betsy Faria. Pamela Hupp and Betsy received the same training and certifications necessary to sell life insurance products in the State of Missouri. (testimony of Pamela Hupp);

58. Pamela Hupp and Betsy had a very close friendship for many years. (testimony of Pamela Hupp);

59. Betsy Faria was employed in the insurance industry for approximately twenty years and that one of her primary area of sales was for the sale of life insurance products. Part of their training included instruction in the area of naming beneficiaries under life insurance policies and the changing of beneficiaries including the naming of minors, trust agreements and naming individuals on behalf of others. (testimony of Pamela Hupp);

60. Pamela Hupp, Betsy and Betsy's father also engaged in a side business selling life insurance policies outside of State Farm. (testimony of Pamela Hupp);

61. Pamela Hupp testified that Betsy specifically did not want her sisters or parents to have any control over the life insurance proceeds;

62. Pamela Hupp testified that Betsy Faria had concerns with respect to Mariah Day and Leah Day regarding drug use, stealing and irresponsibility as well as the fear that they would blow the money if they were to have access to it;

63. Pamela Hupp testified that neither Leah Day nor Mariah Day ever asked Pamela Hupp for any money or assistance since the 27th day of December, 2011;

64. That Pamela Hupp testified she was contacted by Betsy Faria's sisters during the months following Betsy Faria's murder, demanding that she help pay for Betsy's funeral and turn over the proceeds of the State Farm life insurance policy to them;

65. That Pamela Hupp testified she had received the State Farm life insurance proceeds of approximately \$150,000.00 and the only instructions given to her by Betsy Faria were that she have the ability "to help the children in the future if she could";

66. The State Farm life insurance proceeds were deposited into a joint checking account held with Pamela's husband Mark Hupp. The funds were comingled with other monies for approximately two years prior to the commencement of this lawsuit. (testimony of Pamela Hupp and Mark Hupp);

67. Detective McCarrick, during the June 25, 2012 interview, suggested that it would be beneficial to the prosecution of Russ Faria that a trust agreement be created for the benefit of the Plaintiffs. (testimony of Pamela Hupp);

68. Pamela Hupp created a revocable living trust prior to the first trial of Russ Faria. Pamela Hupp was influenced by Detective McCarrick's comments in doing so. (testimony of Pamela Hupp);

69. Shortly after Russ Faria's conviction at his first trial, Pamela Hupp terminated the living trust agreement. (testimony of Pamela Hupp);

70. Since on or about the 28th day of December, 2011, Pamela Hupp has made

inconsistent statements regarding the intended use of the proceeds of the life insurance policy and has lied to Julie Swaney about gifting said proceeds to charity because she was tired of being harassed by the Plaintiffs' family members. (testimony of Pamela Hupp);

71. Pamela Hupp testified that she has difficulties with her memory at times due to traumatic brain injury. She also made previous statements that she did not have memory issues;

72. Pamela Hupp stated that she did not intend to give Leah and Mariah any of the insurance proceeds. However, she testified upon examination of plaintiffs' counsel that she was still considering giving money to the Plaintiffs and has not ruled out giving the Plaintiffs some money from the insurance proceeds. (testimony of Pamela Hupp);

73. Mark Hupp did not have any interactions with the Plaintiffs or members of plaintiffs' family. (testimony of Mark Hupp)

74. Mark Hupp was never named as beneficiary on the State Farm life insurance policy of Betsy Faria, (testimony of Mark Hupp);

75. Leah E. Day, daughter of the deceased, Betsy Faria, although present throughout the trial, did not take the stand or testify in support of the allegations contained in her Second Amended Petition;

76. Plaintiff Mariah L. Day, daughter of the deceased, Betsy Faria, also present throughout the trial, did not take the stand or testify in support of the allegations contained in her Second Amended Petition;

77. Neither Plaintiff testified as to what, if any, relief they were seeking from this Court;

78. There was no evidence offered by Plaintiffs to contradict the testimony of Julie Swaney regarding the problems Betsy Faria experienced with the Plaintiffs regarding drug use, stealing and irresponsibility;

79. There was no evidence offered by Plaintiffs as to any specifics of any terms of

what Betsy Faria's intent was with respect to when or how Pamela Hupp was to "take care of" the Plaintiffs;

80. Mark Hupp was not a party in the case at the times of all depositions taken in this case, and therefore upon motion by Defendants' counsel, said depositions are not to be considered evidence against Defendant Mark Hupp;

81. Plaintiffs did not introduce any evidence as to attorney fees.

CONCLUSIONS OF LAW

Equitable Power of the Court

This Court, sitting in equity, recognizes its broad powers to achieve justice and to fashion a remedy to prevent injustice. *Riddle v. Elk Creek Salers Ltd.*, 52 SW3d 644, 650 (Mo. App. 2001). To achieve the goal of preventing an injustice, a Court in equity is free to "consider all equitable considerations and to fashion flexible remedies to meet the needs of justice on a case by case basis." *Umpres v. J. R. Mayer Enterprises, Inc.*, 889 SW2d 86, 92 (Mo. App. 1994).

Parol Evidence

Defendants argue that the Change of Beneficiary Form in this case is clear and unambiguous and therefore, evidence coming from outside the four corners of the document should not be considered by the Court. Defendants argue that under Missouri law, "[i]f a contract is unambiguous, the intent of the parties is to be discerned from the contract alone based on the plain and ordinary meaning of the language used." *Whelan Security Co. v. Kennebrew*, 379 SW3d 835, 846 (Mo. En Banc. 2012) (internal quotations omitted). Defendants further argue that a party cannot use parol evidence to create an ambiguity or to show that an obligation is other than that expressed in the written instrument. *Ticor Title Insurance Company*

v. Mundelius, 887 SW2d 726, 732 (Mo. App. 1994). Finally, defendants argue that the language of the Change in Beneficiary Designation Form must be interpreted pursuant to its plain and ordinary language indicating that Pamela Hupp is the sole beneficiary under the life insurance policy and received said proceeds as a gift from Betsy Faria.

The Change in Beneficiary Form is indeed clear and unambiguous. It names Pamela Hupp as the sole designated beneficiary of Betsy's insurance proceeds and contains no restrictions on Pamela's use of the funds. However, parol evidence is admissible for a Court in equity to impose a constructive trust. *Jackson v. Tibbling*, 310 SW2d 909, 914 (Mo. 1958). Exceptions to the parol evidence rule include circumstances involving allegations of fraud or unjust enrichment. *Stanfield v. Grove*, 924 SW2d 611, 613 (Mo App. 1996) The Court overruled defendant's objections at trial to parol evidence and considers such evidence in its findings and conclusions herein.

Hearsay Evidence

Statements of a decedent as to the decedent's intent as to the disposition of property following death are admissible under the "state of mind" exception to the hearsay rule. *In re Estate of Dawes*, 891 SW2d 510, 520 (Mo. App. 1994). The Court overruled the defendants' objections to such hearsay exceptions regarding Betsy's intent and considers those statements in its findings.

Constructive Fraud and Unjust Enrichment

Plaintiffs' claim on Count I of their Second Amended Petition is based on Constructive Fraud and is directed to defendant Pamela Hupp only. The elements required to properly plead a claim of constructive fraud are identical to those required for a claim based on actual fraud, with the exception of the fourth element, the speaker's knowledge of a statement's falsity. *Droz v. Trump*, 965 SW2d 436 (Mo. App. 1998). The essential elements to establish liability for actual fraud are: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its

falsity; (5) the speaker's intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of the falsity of the representation; (7) the hearer's reliance on the representation being true; (8) his right to rely thereon; and, (9) the hearer's consequent and proximately caused injury. *Id* at 441. See also *Abell v. City of St. Louis*, 129 SW3d 877 (Mo. App. 2004). Unlike the fourth element based on actual fraud, to establish the fourth element of a claim based on constructive fraud, it is not necessary for the plaintiff to plead and prove that the defendant had knowledge of the falsity of his or her representation, but only that he or she was ignorant of its truth. *Id*.

Plaintiffs' claim on Count II of their Second Amended Petition is based on Unjust Enrichment and is directed to defendants Pamela Hupp and Mark Hupp. The elements of unjust enrichment are:

(1) [the plaintiff] conferred a benefit on the defendant, (2) the defendant appreciated the benefit, and (3) the defendant accepted and retained the benefit under unequitable and/or unjust circumstances. *Howard v. Turnbull*, 316 SW3d 431, 436 (Mo. App. 2010).

or

(1) that the defendant was enriched by the receipt of a benefit, (2) that the enrichment was at the expense of the plaintiff, (3) that it would be unjust to allow the defendant to retain the benefit. *Ticor Title Ins. Co.*, 887 SW2d at 727. *Executive Board of Missouri Baptist Convention v. Windermere Baptist Conference Center*, 280 SW3d 678, 697 (Mo. App. 2009).

The Plaintiffs did not make an election of remedies at trial between their claim in Count 1 for constructive fraud (against Defendant Pamela Hupp only) and in Count 2 for unjust enrichment (against both Defendants Pamela Hupp and Mark Hupp). Therefore the Court will examine both theories of recovery.

The remedy Plaintiffs seek is an order of restitution. Plaintiffs stated in their closing argument that they are not seeking a constructive trust, however their Post-trial brief argues for the establishment of a constructive trust. A constructive trust can be used by a Court of equity

as a means of effecting restitution. Establishing a constructive trust requires clear, cogent and convincing evidence. *March v. Gerstenschlager*, 436 SW2d 6, 8 (Mo. 1969). Plaintiffs place considerable reliance on *Perry v. Perry*, 484 SW2d 257 at 260 (Mo. 1972) to argue that the Court should intervene to transfer the funds to the Plaintiffs. While *Perry* stands for the proposition that this Court has the ability to impose a constructive trust and fashion an equitable remedy if appropriate, the facts of *Perry* are not analogous. *Perry* was a dissolution of marriage case in which the husband had agreed to and had been ordered to name the children as the beneficiaries of his life insurance policy. He died before doing so. The *Perry* Court imposed a constructive trust for the children in the amount of the proceeds. By contrast here, Leah and Mariah were not Pamela Hupp's children, there was no agreement by anyone to name Leah and Mariah as beneficiaries and there was no court order for Pamela to do so.

Additionally, Plaintiffs, through the offer and admission of Plaintiffs' Exhibit "1", acknowledge that the Change in Beneficiary Designation Form is a valid contract that clearly identifies Pamela Hupp as the sole beneficiary under Betsy's life insurance policy. At no time did Plaintiffs' ever argue that the Change in Beneficiary Designation Form executed by Betsy should be rescinded.

It is possible in the law of our state to disregard the unambiguous stated beneficiary designation on an insurance policy. It is, however, rare and difficult to do so, as it should be. The only person who cannot speak for herself here is the deceased insured. The Court must tread very carefully in changing the clearly stated written intentions on an insurance beneficiary designation and may deviate from those stated wishes only under compelling circumstances. That threshold has not been met in this case.

To establish constructive fraud it is necessary to prove the acts of fraud. *Fix v. Fix*, 847 SW2d 762 (Mo. 1993). Proof of constructive fraud depends necessarily upon the actual

circumstances of each case. *Swon v. Huddleston*, 282 S.W.2d 18, 26 (Mo. 1955). The absence of clear, cogent and convincing evidence will preclude both the finding of constructive fraud and the imposition of a constructive trust. *Fix* 847 SW2d 762 at 765. The burden of proof in most civil cases is a "more likely true than not true" standard. "Clear, cogent and convincing evidence" imposes a higher burden of proof on the Plaintiffs.

Even in viewing the evidence in a light most favorable to the Plaintiffs the Plaintiffs failed to establish by clear, cogent and convincing evidence that the Plaintiffs were defrauded in any way by Defendant Pamela Hupp and therefore their claims for constructive fraud and constructive trust fail. The court finds no fraudulent misrepresentation by the Defendant Pamela Hupp in this case. Where there is no fraudulent misrepresentation there can be no constructive fraud.

The case boils down largely to the statements that Betsy supposedly made regarding her intent and the insurance benefits. The evidence about Betsy's statements impacts the largest part of the Court's analysis of the facts. These statements were essentially as follows:

Pamela Welker was Betsy's sister. Pam Welker testified that:

- Pamela Welker learned of the life insurance policy in question for the first time from Pam Hupp at a gathering at Betsy's and Pam Welker's mother's home in Lake St. Louis the day after Betsy's death.
- Pam Hupp told her the day after Betsy's death that in changing the beneficiary designation to Pam Hupp, Betsy wanted to "make sure her children are taken care of" in light of Betsy's terminal illness.
- "Pam Hupp was clear that Betsy was clear that the money was for Leah and Mariah," but that there was "nothing specific" in Betsy's instructions.

Bobbi Wann was a friend of Betsy's. Bobbi testified that:

- Betsy told Bobbi the day she died that she changed the beneficiary from Russ Faria to Pam because she wanted to be sure that Leah and Mariah received the money. (Wann Deposition p. 17.

- Pam told Bobbi the day Betsy died that Pam would make sure that the girls got the money. (Wann deposition p. 18)
- Bobbi did not discuss with Betsy specifically how or when the life insurance money should be used or turned over to the daughters. (Wann deposition p. 38).
- Betsy never said that at her death she wanted the money to be turned completely over to the girls (Wann deposition p. 49).
- Betsy never said that she wanted the money to be turned over to anybody other than Pam at Betsy's death (Wann deposition p. 50).

Pam Hupp testified as follows:

- She and Betsy were close friends like sisters.
- Betsy did not say that Betsy wanted the money used for Leah and Mariah.
- Betsy said that she wanted Pam to be the beneficiary and that Betsy said that Betsy did not want Russ, or her daughters or parents to have the money.
- Betsy told Pam that Betsy wanted to make Pam the beneficiary and "if you could, give some to the kids when they are older."
- Pam told law enforcement officers that Betsy would have liked for her daughters to have some of the money.
- Betsy told Pam that Betsy was going to leave her husband and wanted to change the beneficiary from Russ so that Russ would not get the money. Pam and Betsy discussed changing the beneficiary to Betsy's mother, sisters or daughters. Pam suggested that Betsy make Betsy's mother or Betsy's sisters the beneficiary. Pam said that Betsy said that Betsy did not want Betsy's mother to be the beneficiary because Betsy's mother would give all of the money to Betsy's daughters. Pam testified that she asked Betsy why she would not just give it to Betsy's daughters and Betsy was adamant that the money not go to her daughters. Pam said that Leah had just been awarded \$36,000 in a "rape case" and "blew through the money in a year." Pam testified that the daughters had not lived with Betsy the last three years of Betsy's life. Betsy said her daughters were "partying and doing drugs" and that Leah had stolen a credit card from her grandmother and that the girls were disrespectful toward their grandmother. Pam said that Betsy was going to change the beneficiary designation from Russ on a different life insurance policy for the same reasons.
- When Betsy told Pam that Betsy wanted to name Pam as the beneficiary on one of Betsy's life insurance policies, Pam told Betsy that she didn't feel comfortable "getting in

the middle of family chaos” and that Pam didn’t know Betsy’s daughters well. Pam said that she then told Betsy that she can do it and Betsy said “If you could when the girls get older you can help them out.”

- While Pam has been frequently contacted by other members of the family about the proceeds, Leah and Mariah have never asked her for help or money.
- Betsy did “absolutely not” tell Pam that Betsy wanted Pam to hold the money for Betsy’s daughters. (Pam Hupp deposition)
- Pam never spoke with Bobbi Wann about a life insurance policy before Betsy died.

Lauren Manganelli was the librarian who witnessed the change of beneficiary form at the Winghaven Branch of the St. Charles City-County Library (Plaintiff’s Exhibit 1). Manganelli testified that:

- Pam and Betsy told Lauren that “Betsy was going through a divorce, and that’s why she was changing her benefits so her children could be the beneficiaries.”
- Pam said at the time that “Betsy was going through a divorce and they were changing the beneficiaries on her life insurance form so her children could be included.”
- Betsy did not say at the library how the life insurance proceeds were to be used. (Manganelli 7/2/14 deposition page 34, line 19; page 35, lines 18-21)
- “That was the implication that I got” that the money was for the children.
- Betsy said that Pam was her best friend and that is why the beneficiary was changed to Pam.

Rita Wolf was a long-time friend of Betsy. Rita testified that:

- Betsy wanted Rita’s assistance with a life insurance policy and that Betsy wanted the girls taken care of when Betsy died.
- Betsy asked Rita to be the designated beneficiary. Rita said that she did not feel that it was appropriate for Rita to be the beneficiary and that Betsy should ask one of Betsy’s sisters to be the beneficiary. Rita told Betsy what Betsy really wanted or meant was for Rita to be the “Executor” (Personal Representative) of her estate.
- Rita said that Betsy wrote on a note pad “all the things she wanted to do for her daughters”. “We went through pretty much with a fine tooth comb where she wanted every dollar to go”.

- Rita explained to Betsy that making Rita the beneficiary was tantamount to giving Rita the money and that was not what Betsy wanted to do.

This conversation between Rita and Betsy is an indication that Betsy had been informed that naming someone as a designated beneficiary means that that person gets the money, something Betsy would have already known from her long experience and training selling life insurance and training other salespersons. Betsy did not give Rita a copy of Betsy's itemization of her wishes for her daughters. Whatever Betsy's notes contained, if there were any such notes, it is not in evidence in this case.

Brian McCarrick was a detective in the Lincoln County Sheriff's Office. McCarrick testified that:

- Pam Hupp told McCarrick and other investigators that Betsy wanted Pam to get the money so that Pam could get the money to Betsy's daughters.

The Court concludes that it is not possible from this limited evidence to determine with any specificity what Betsy's intent was regarding the insurance proceeds, other than that stated on the beneficiary form. The Court rejects as not credible any evidence that Betsy Faria intended her two daughters to immediately receive the \$150,800 life insurance proceeds upon her death. If that were Betsy's intent, it would have been simple for her to accomplish that intent. She was employed in the life insurance industry for many years, she trained State Farm employees in the issuing of life insurance policies, and she knew how to have her daughters receive the money if that were her intent. She did not do so. By the clear and unambiguous terms of the beneficiary designation Betsy Faria intended for Pam Hupp to receive the life insurance proceeds. The only reasonable application of the evidence adduced at trial in a light favorable to the Plaintiffs is that Betsy Faria wanted Pam Hupp to share at least some of the money with the daughters in some unspecified percentages at some unspecified time in the future. Even if this were the findings of fact of the Court, the suggested intent of Betsy Faria is too nebulous and unspecific for the Court to fashion such a remedy. There was no evidence from Leah and Mariah themselves as to the relief they are seeking under this lawsuit. There is not enough evidence

for the Court to determine Betsy Faria's intent with enough specificity to overcome the burden plaintiffs have in deviating from the unambiguous designation of Pam Hupp as the sole and unrestricted beneficiary of the life insurance. For the Court to find constructive fraud or find unjust enrichment and order restitution of the proceeds would require the Court to create out of thin air evidence that simply does not exist in this case.

Betsy Faria did not intend for a family member to control the proceeds of the State Farm life insurance policy, nor did she intend for the Plaintiffs to have direct access to the money. This is established by the testimony of not only Pamela Hupp, but also Rita Wolf. The fact that Betsy did not place any limitations on Pamela Hupp's use of the life insurance proceeds, which Betsy clearly knew how to accomplish, based on the training in obtaining her license to sell life insurance products and her many years of experience in the life insurance industry, can only mean that she intended no such limitations.

Plaintiffs make much in their arguments of Pamela's inconsistent statements made after Betsy's death as to what Pamela would do with the money. In some cases, Pamela offered explanations for her statements, such as telling family members she would share some of the money just to get them to leave her alone, or testifying at the criminal trial as to what she thought the police wanted her to say. Pamela's contradictory statements made after Betsy's death as to what Pamela would do with the money damage Pamela's overall credibility, but such statements shed little light on what Plaintiffs ultimately need to prove in order to prevail, namely Betsy's specific intent at the time Betsy named Pamela as the designated beneficiary. Pam's inconsistent statements made after Betsy's death about Pam's intentions with regard to the money are largely irrelevant and have little probative value. Pam Hupp provided contradictory stories regarding Betsy Faria's stated intent as well as her own intent. The burden, however, is on the Plaintiffs to prove the elements of their claims. Plaintiffs have failed to do so. Pamela may ultimately choose to share some of the money with Leah and Mariah or

she may not. She has been pressured by the police, hounded by the family and sued by Leah and Mariah. Over time her resentment may soften. Giving inconsistent statements is not excusable, but it is understandable under these very trying circumstances. Even accepting Plaintiffs' theory of the case, there is no way from the evidence for the Court to determine when or in what amounts Pamela was supposed to distribute money to Leah and Mariah. Betsy left it up to Pamela Hupp.

Plaintiffs assert in both counts of their Second Amended Petition that Pam Hupp promised to give the money to Betsy Faria's daughters. Pam Hupp's statement to the police after Betsy Faria died is:

"And [Faria] goes, would you be my beneficiary on my life policies and make sure my kids get it when they need it. And I said, well, I could. . . . She said, I'm going to make you the beneficiary. If you could, when my daughters are older, give them some money. I said, Okay."

The Court finds that this quote from Pamela Hupp is credible. In determining the credibility of a witness, it is often true that if a person lies once, then they have lost their credibility for anything else they say. This situation is different. Pamela Hupp has lied on occasion but she is not a very good liar. Pamela's admissions in this trial about when she lied previously are probably true. In other words, it is pretty easy to tell when she is lying and when she is not. Judging from the totality of the circumstances the Court finds that the above version of this conversation between Betsy and Pam about the insurance proceeds is very likely almost exactly what occurred. This quote seems natural under the circumstances and makes sense in the context. The Court finds that this conversation does not constitute an enforceable promise. In order to fashion the remedy that Plaintiffs are seeking the evidence would need to clearly define the amount of such a transfer, the timing of such a transfer and the conditions that must be met in order for the transfer to be made. All of this specificity is lacking. Furthermore, Pam Hupp doesn't necessarily promise to do anything, nor does Betsy Faria rely on a promise of Pam

Hupp. Pam Hupp's response "I could" is not a statement that she will do anything. It is a stretch to suggest that Hupp's response "Okay" to Betsy's statement "if you could" is a promise that imposes an absolute obligation on Hupp to do anything. Hupp's response "Okay" is in response to Betsy's declaration that Betsy apparently has already decided what she wants to do, namely to make Hupp the beneficiary. Betsy does not change the beneficiary designation in reliance on anything Hupp said or inferred. Betsy said "If you could" give my daughters some money when they are older. "Could" is only conditional and we don't know what the conditions were supposed to be. It imposes no definite obligation on Pam Hupp.

Contrary to Plaintiff's arguments in the very first paragraph of their 25 page Post Trial Brief, there is little evidence that Betsy changed the beneficiary on the life insurance policy from Russ Faria to Pam Hupp "in reliance on Pamela Hupp's promise to use those funds for benefit of Betsy's daughters." There is evidence that Betsy may have wanted Pamela to give all or part of the money at some point in time to her daughters, but the evidence is insufficient to suggest that Betsy made the change of beneficiary in reliance on a promise from Pamela. Bobbi Wann testified that Betsy told Pamela the day Betsy died that Pamela was being named the designated beneficiary so that "the girls would get the money". Wann also testified that Pamela told Betsy that Pamela would make sure that "the girls got the money". Both of these statements may have been made, but it is not clear that Betsy only named Pamela as the beneficiary because Pamela agreed to give the money to the daughters. These statements were not made at the time the beneficiary was changed by Betsy and do not necessarily reflect a promise made by Pamela. These statements were made four days later on the day Betsy was killed. It is probable that Betsy had already decided to name Pamela as the beneficiary whether Pamela ever said that she would give the money to the daughters or not.

Plaintiffs argue that Betsy's intent is evidenced by Hupp creating a trust for Leah and Mariah and then revoking the trust after the first criminal trial of Russ Faria. Pam Hupp

apparently only created the trust for the Plaintiffs at the suggestion of the police detectives and the prosecuting attorney to help them in their prosecution of Russ Faria. This does not evidence Pam Hupp's or Betsy Faria's intent that Pam Hupp give Leah and Mariah money.

Generally, if a plaintiff seeks recovery of the very subject matter contained within an express contract then unjust enrichment does not apply, for the plaintiff's recovery rights are limited to the express terms of the contract. *Howard*, 316 SW3d 431 at 436.

Beneficiaries of life insurance proceeds have been enriched in that they have received a benefit for which no consideration was given. Pamela Hupp gave no consideration and made no specific promise to Betsy in exchange for being named beneficiary on the life insurance policy.

There is insufficient evidence that the life insurance proceeds were intended by Betsy Faria to be used solely and exclusively for the benefit of the plaintiffs. Pamela Hupp testified that she had a long, close and intimate relationship with Betsy Faria. This was not contested by any of the Plaintiffs' witnesses in either the Plaintiffs' case in chief or in rebuttal. Plaintiffs argue that they should be the sole de facto beneficiaries of the life insurance policy but in fact they were never listed as beneficiaries in any of Betsy's life insurance policies.

Betsy was concerned about the maturity of her daughters and about their behavior. There is evidence that Betsy was concerned that her daughters would squander the money if they received it. She wanted to wait until the daughters were older. Pamela Hupp offered uncontroverted evidence that Leah had received a settlement involving an allegation of rape in the amount of \$36,000 and quickly squandered the money. Leah was living with her boyfriend. There is also evidence that Betsy Faria was concerned that her daughters used illegal drugs and would use the money to buy drugs. If that is the reason Betsy Faria did not name her

daughters as the beneficiary or at least set up any kind of trust for the benefit of the daughters, the Court must then determine if the issues about which Betsy was concerned have been addressed or alleviated. No such evidence was presented. Transferring the money to the daughters now may well be the very opposite of Betsy's intentions. There is no way for the Court to know because no evidence was presented by the Plaintiffs on this issue other than that they are four years older. If in fact the daughters were unable to handle money, there is no evidence to indicate that they can now do so four years later. There is some evidence that Betsy told Pam that she should give "some" of the money to the daughters "when my daughters are older". One possible and rational interpretation of this is that the time at which Pam Hupp was supposed to give "some" money to the daughters has not yet passed. Was it to be two years, five year, ten years..... We don't know. Even if Pam Hupp owes the Plaintiffs money, we don't know if that money is due yet or not. It is difficult to know exactly what Betsy intended. The relief that Plaintiffs are seeking, namely to get all of the money now, is the one thing we know for sure that Betsy did not intend. If that is what Betsy wanted to do, she would have done it. She did not. Plaintiffs argue that it has been over four years since Betsy's death and so it may now be appropriate to give the plaintiffs all of the money. Plaintiffs offered no evidence that the issues Betsy expressed concern about regarding her daughters four years ago do not still exist. The daughter's problems could be resolved or they could be much worse. We do not know. We do know that Betsy did not want Leah to have the money when Leah was 21. At the date of trial, Mariah was still only 21.

Plaintiffs are asking the Court to give all of the insurance proceeds to them immediately. Plaintiffs argue that the case is ripe even if the Court only believes that Plaintiffs have a future interest in the policy proceeds. Plaintiffs argue that a constructive trust may be imposed to protect the plaintiff's future interest in the property to prevent unjust enrichment, citing *Brown v. Brown*, 152 SW3d 911, 919-920 (Mo. App. 2005). That Betsy never specified the timing or

amount of any distribution to Leah and Mariah does not in and of itself defeat Plaintiffs' claim for relief with regard to ripeness. The Court, however, does find on the merits, as discussed herein, that Plaintiffs have not met their burden of proof as to the elements of constructive fraud and unjust enrichment.

Even though Plaintiffs place a great deal of emphasis on Betsy's intent, Plaintiffs seem to employ a circular logic and ultimately argue that the lack of specifics of Betsy's wishes as to when and how much Pamela was supposed to turn over to Leah and Mariah really doesn't matter. Plaintiffs' position seems to be that Betsy intended for Leah and Mariah to eventually get most or all of the proceeds so they should be awarded all of the proceeds now because Pamela hasn't conferred with Leah and Mariah or given them anything yet and therefore Plaintiffs' future interest must be protected and restitution in the full amount is warranted. Plaintiffs further argue that Pamela and Mark spent the money and the money is no longer available. The Court finds that the money is still available. The funds have been comingled, but the defendants retain sufficient assets that can be liquidated in order to give some or all of the insurance proceeds to Leah and Mariah if defendants choose to do so using the discretion that Betsy gave to Pamela Hupp. While the Court is not specifically finding that the case is not ripe for adjudication, the time at which Betsy may have intended for Pamela to share some of the proceeds with Betsy's daughters may very well have not yet arrived. As discussed above, Betsy never stated what the conditions for distribution of the money were and there is no evidence that any such conditions have been met. It is therefore not unjust for Pamela and Mark Hupp to retain the proceeds.

The Court finds that the enrichment that Betsy conferred upon Pamela and ultimately on Mark Hupp as well was not conferred at Plaintiff's expense. If Betsy had intended her daughters to receive the funds it would have been relatively easy for her to do so in an enforceable way. The Court finds that it would not be unjust to allow Pamela to keep the benefit

she received. In being named the designated beneficiary, there is insufficient evidence that Pamela Hupp did anything fraudulent or wrongful. In essence, it is not Pamela's fault that Betsy named her as the designated beneficiary. There is no evidence that Pamela asked to be named the beneficiary or exerted any pressure or influence (undue or otherwise) to get Betsy to name her as the beneficiary. Pamela testified credibly that she really didn't want to be the designated beneficiary and initially suggested to Betsy that she name a family member instead. Pam testified that she didn't need the money. Pamela made no promise to Betsy upon which Betsy relied. The evidence is insufficient to find that the Defendants are retaining the funds unjustly.

The inescapable conclusion is that if Betsy wanted Leah and Mariah to receive the proceeds, she could have given the proceeds to them. She could have made an outright designation of her daughters as the designated beneficiaries, she could have designated some person as the beneficiary with instructions and restrictions on the use of the money for her daughters, or she could have created a trust for their benefit. Her knowledge and sophistication was well above the average insured person. She worked in the life insurance industry for many years with Met Life and State Farm and she knew how to accomplish her objectives without great expense. By the evidence, she didn't trust her husband and she didn't trust her daughters. She could have made any of her sisters the beneficiary of the policy but she didn't want to do that either. She was of sound mind and she had a lot of time to think about the consequences of what she chose to do. She may have intended for some of the proceeds to get to her daughters eventually, but she took no steps to effectuate such a desire.

The sad thing about this situation is that Betsy Faria cannot tell us either what she intended in December of 2011 or what she would do with the insurance proceeds today. The way to honor her memory and the proper course of action for the Court under the law and the evidence is not to speculate about what she might have intended. It is rather to give effect to

what she actually did, which is to allow her close friend Pamela Hupp to use the money at Pamela's discretion.

Attorney Fees

The Plaintiffs pled for the court to award the Plaintiffs their attorney fees in equity. The court finds that the Plaintiffs abandoned this claim as the Plaintiffs put on no evidence of attorney fees at trial. In any event, Plaintiffs are not the prevailing parties.

ACCORDINGLY, IT IS THE JUDGMENT OF THE COURT:

Count I

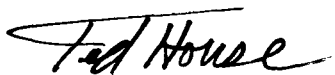
As to Count I of the Plaintiffs' Second Amended Petition, Judgment is entered against the Plaintiffs and in favor of the Defendants;

Count II

That as to Count II of the Plaintiffs' Second Amended Petition, Judgment is entered against the Plaintiffs and in favor of the Defendants.

It is further ordered that the Court costs are taxed in favor of the Defendants and against the Plaintiffs, jointly and severally, in the sum of \$2,666.25.

So Ordered:



Ted House
Circuit Judge, Division 1

Judgment entered February 25, 2016.