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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Alan Albrecht Plaintiff/Appellant v. Mark Albrecht and Kim Albrecht, Defendant/Appellees	Supreme Court No. 20190222 Southeast Judicial District, Stutsman County 2019-CV-00035

ON APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DATED JUNE 21, 2019 AND JUDGMENT ENTERED JULY 8TH, 2019

BRIEF OF APPELLANT ALAN ALBRECHT

ORAL ARGUMENT REQUESTED

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TABLE OF AUTHORITY

Statutes

Others

STATEMENT OF THE CASE

[¶1] This case, and the cases that preceded it, *Albrecht v. Albrecht*, 856 N.W.2d 755 (ND 2014) and In *the Matter of the Estate of Sharleen Albrecht v. Glenvin Albrecht*, 908 N.W. 2d 135 (ND 2018), give witness to the legal chaos that is caused when a party to a dissolution action liquidates assets and changes beneficiaries on investment accounts in contravention of courts orders precluding the same. In most instances, when conduct like this occurs, the transactions that take place can be accounted for in some way or even reversed during the divorce litigation. However, when the offending party dies prior to the discovery of the prohibited conduct, it becomes impossible to just fix it. The assets in question may end up outside of court's adjudicatory powers. A party may be limited to retrieving a portion of what is in the other spouse's estate and allowed only what is available under the spousal elective share statute. These cases are testaments as to why it is important to maintain the status quo during the course of a dissolution action.

[¶2] In February 2010, Glen Albrecht filed for a divorce. It was not until October 2012 and March of 2013 (2.5 and 3 years) after the case was first filed, that hearings took place to

decide how the property of the parties was going to be divided. Sharleen passed away in July 2013. Three days after the reports of Sharleen's death, Judge Greenwood issued an order dividing the property at issue. Ultimately, that judgment was abated by this court in December 2014. *Albrecht v. Albrecht*, 856 N.W.2d 755 (ND 2014)

[¶3] It was not discovered until sometime in 2015 and early 2016 that Sharleen had committed a number of acts that violated the summons restraining order and the interim order issued in the divorce action. Those acts resulted in over $538,000 of martial property being transferred to Mark Albrecht. Glen Albrecht sought to recover that property and filed a claim in the estate in February 2015. Almost two years later, a hearing on the claim took place in October 2016. The lower court ruled against Glen Albrecht in its order issued in January 2017. *In the Matter of the Estate of Sharleen Albrecht v. Glenvin Albrecht*, 908 N.W. 2d 135 (ND 2018), this court affirmed the decision of the lower but for reasons other than those put forward by the lower court. In that decision, this court concluded that Glen Albrecht had a remedy through the spousal elective share provisions. [1]

[¶4] Part of the wrongful conduct committed by Sharleen Albrecht included selling the asset at issue in this case. At the time she sold the account, this Appellant was one of three beneficiaries named on the account. When the account was sold, the funds were transferred into a checking account jointly owned by Mark and Sharleen. Those funds were ultimately used to purchase a home jointly owned by Mark and Sharleen.

[¶5] In the case at hand, the lower court concluded that the Plaintiff lacked standing because he did not have a vested interest in the Franklin Acct. He was not vested because Sharleen had the right to liquidate the account and the right to change the beneficiary of the account. She was free to do that because the account was in her name only and because the

[1] Under 30.1-05-05 (2-211) claims for elective share need to be made within nine months after the date of the decedent's death, or within six months after the probate of the decedent's will, whichever limitation later expires. It was not until December 2014 that this court ruled that Glen Albrecht was the surviving spouse of Sharleen Albrecht. Thus, he was time barred by the statute of limitations in making this claim.

summons and interim orders did not prohibit her from selling investment accounts or from changing the beneficiary on an investment account.

STATEMENT OF THE FACTS

[¶6] This matter stems from a divorce between Glenvin Albrecht ("Glen") and Sharleen Albrecht ("Sharleen"), the parents of Plaintiff and Mark Albrecht.

[¶7] Glen filed for a divorce from Sharleen in February 2010. Sharleen was served with a summons that prohibited her from transferring assets and instructed her to maintain all available insurance and all beneficiaries without change in coverage or beneficiary designation. (Index #42) The interim order issued also restrained her from engaging in similar conduct. (Index #43)

At the time of the commencement of the divorce action, Plaintiff was named as one of three beneficiaries on a Franklin Templeton account owned by Sharleen Albrecht. Plaintiff received a letter from Franklin Templeton Investments on October 16, 2016. The letter indicated that Plaintiff was designated as a beneficiary of the account at the time the account was liquidated by Sharleen Albrecht on March 11, 2013. (Index #45)

[¶8] While the restraining provisions were in place, Sharleen liquidated the Franklin Templeton account and deposited the proceeds into her checking account. This checking account was jointly owned by her and Mark Albrecht. (Index #48, 49, 51) (This joint checking account was set up after the summons and interim order were in place). Sharleen then used the proceeds to purchase a home on Hwy 20 in Jamestown, ND. (Exhibit #52, 53, 54, 55). When she purchased the home, she named Mark Albrecht as joint owner of the house. (Index #52).

[¶9] After her death, the home purchased by Sharleen Albrecht was sold by Mark Albrecht and the proceeds from the sale of the house went to Mark Albrecht. (Index #53, 54, 55)

[¶10] After the proceeds of the sale of the home were received, Mark Albrecht deposited the funds into his account at Wells Fargo. (Index #54)

[¶11] As related to the asset in issue, we know, without dispute, that the following activities took place.

a. Sharleen Albrecht liquidated the Franklin Templeton account. Plaintiff, at the time of liquidation, was a named beneficiary of the account.

b. The proceeds from the liquidation then went into a checking account owned by Mark and Sharleen Albrecht.

c. Sharleen Albrecht used the funds in the jointly held account to purchase a second home on Hwy 20 in Jamestown ND.

d. When she purchased the home, she made Mark Albrecht a joint tenant of the house.

e. After the house on Hwy 20 was sold, the proceeds went to Mark Albrecht. [2]

THE STANDARD OF REVIEW

[¶12] The case at hand involves questions of law and the interpretation and application of state statutes. Questions of law are fully reviewable on appeal and are reviewed de novo. *Estate of Harms*, 2012 ND 62, ¶ 7, 814 N.W.2d 783; *Estate of Gleeson*, 2002 ND 211, ¶ 7, 655 N.W.2d 69. *Bruce J. Wenzel Estate v. Wenzel*, 2008 ND *68*, ¶ 5, 747 N.W.2d 103 (2008) ("Questions of law are fully reviewable on appeal.").

Motion to dismiss

[¶13] This Court reviews a district court's decision granting a motion to dismiss under N.D.R.Civ.P. 12(b) (6) de novo. *Brandvold v. Lewis & Clark Pub. Sch. Dist. No. 161*, 803 N.W.2d 827 (ND 2011) A lower court's decision to dismiss a claim should be affirmed only if this court cannot discern the potential proof for the claim. *Vandall v. Trinity Hospitals*, 2004 ND 47, 115, 676 N.W.2d 88.

[2] The Defendant has actually argued that he did not receive the money from the liquidation of the Franklin account. At the same time, he would admit that the money from the Franklin Account was put into a checking account; that he was joint owner of that account, and that money from that account was used to purchase the home he jointly owned with Sharleen Albrecht.

Unjust enrichment.

[¶14] A determination of unjust enrichment is a conclusion of law, *Matter of Estate of Zent*, 459 N.W.2d 795, 798 (N.D.1990), and is fully reviewable by this court, *Opp v. Matzke*, 1997 ND 32, ¶ 8, 559 N.W.2d 837 *In the Matter of the Estate of Hill*, 492 N.W.2d 288 (N.D.1992). Generally, "[a] determination of unjust enrichment is a conclusion of law `because it holds that a certain state of facts is contrary to equity,' and therefore, a district court's determination whether there has been unjust enrichment is fully reviewable." *Broten v. Broten*, 2017 ND 47, ¶ 10, 890 N.W.2d 847 (quoting *Matter of Estate of Zent*, 459 N.W.2d 795, 798 (N.D. 1990); *Northstar Founders, LLC v. Hayden Capital USA, LLC*, 2014 ND 200, ¶ 53, 855 N.W.2d 614 (whether the facts support unjust enrichment is fully reviewable on appeal); *Smestad v. Harris*, 2012 ND 166, ¶ 15, 820 N.W.2d 363

Findings

[¶15] Appellant is also seeking review of the findings of fact of the trial court. "A finding of fact is clearly erroneous under N.D.R.Civ.P. 52(a) if induced by an erroneous view of the law, if no evidence exists to support the finding, or if, on the entire record, we are left with a definite and firm conviction a mistake was made." *In re Estate of Hogen*, 2015 ND 125, ¶ 36, 863 N.W.2d 876, *reh'g denied* (citing *Brandt v. Somerville*, 2005 ND 35, ¶ 12, 692 N.W.2d 144.

Standing

[¶16] The existence of standing is a question of law which is reviewed de novo. *Nodak Mut. Ins. V. Ward County Farm Bureau*, 676 N.W.2d 676 (ND 2004).

DISCUSSION

ISSUE I

WHETHER THE LOWER COURT ERRED IN GRANTING A MOTION TO DISMISS WITH PREJUDICE

[¶17] The lower court erred as a matter of law in granting the motion to dismiss with prejudice. The test under Rule 12(b)(6) was set out in *In Estate of Dionne,* 2013 ND 40, ¶ 11, 827 N.W.2d 555:

"A motion to dismiss a complaint under N.D.R.Civ.P. 12(b) (vi) tests `the legal sufficiency of the statement of the claim presented in the complaint.'" *Hale v. State,* 2012 ND 148, ¶ 13, 818 N.W.2d 684 (quoting *Ziegelmann v. DaimlerChrysler Corp.,* 2002 ND 134, ¶ 5, 649 N.W.2d 556). "Under N.D.R.Civ.P. 12(b) (vi), a `complaint should not be dismissed unless it is disclosed with certainty the impossibility of proving a claim upon which relief can be granted.'" *Hale,* at ¶ 13 (quoting *Ziegelmann,* at ¶ 5)

This court has previously indicated that on appeal, in a motion to dismiss, the complaint must be construed in the light most favorable to the plaintiff and the allegations in the complaint are accepted as true. *Brandvold v. Lewis & Clark Pub. Sch. Dist. No. 161,* 2011 ND 185, 803 N.W.2d 827. Pleadings are liberally construed so as to do substantial justice. *Tibert v. Minto Grain, LLC,* 2004 ND 133, ¶ 21, 682 N.W.2d 294,

[¶18] In a motion to dismiss under N.D.R.Civ.P. 12(b) (6) pleadings should not be dismissed unless it appears beyond doubt that no set of facts could support a party's claim for relief. *Nelson v. McAlester Fuel Co.,* 2017 ND 49, 1120, 891 N.W.2d 126 (citing *Tibert v. Minto Grain,* 2004 ND 133, 11 7, 682 N.W.2d 294). A district court should grant a motion to dismiss "only if it is disclosed with certainty the impossibility of proving a claim upon which relief can be granted." Id. The tribunal must consider whether the allegations set forth in the complaint give rise to any plausible theory of substantive law that might allow the plaintiff to recover. *Ashcroft v. Iqbal,* 556 U.S. 662, 679 (2009). Determinations on the merits are generally preferred to dismissal of the pleadings. *Kouba. Vebco Inc,* 543 N.W.2d 247 (ND 1996).

[¶19] In the case at hand, the Appellant laid out and established facts supporting the claim of unjust enrichment. In fact, Appellant motion for summary judgment should have been heard and granted. Instead, the court dismissed the compliant. The facts laid out in the

complaint clearly, and without doubt, set forth a plausible theory of substantive law that allow the plaintiff to recover. A motion to dismiss should only be granted if it is impossible for the Plaintiff to prove a claim for recover. *Chase v. State*, 899 N.W.2d 280, 2017 ND 192. In order for it to be impossible for Plaintiff to prove a claim for recovery, this court would have to agree with the lower court that the Summons and Interim order did not prevent Sharleen from selling, and thus changing the beneficiary, the Franklin Templeton Account.

[¶20] By granting the motion to dismiss with prejudice, the lower court in this case essentially concluded that there was no theory of recovery under which the Plaintiff could possibly proceed. By dismissing it with prejudice, Plaintiff is no longer able to assert those other causes of action.

[¶21] Given the standard used in judging a motion to dismiss, it appears that the court could consider theories of recovery even if that theory was not specifically set forth in the complaint. The standard is whether or not the facts set forth give rise to any theory of substantive law that might allow the plaintiff to recover. Other theories of recovery should have been considered. One of these other theories would include constructive trust.

Constructive trust

[¶22] "An implied trust is one that is created by operation of law." N.D.C.C. § 59-01-05. There are two types of implied trusts: resulting and constructive. *Loberg v. Alford,* 372 N.W.2d 912, 915 (ND1985). A constructive trust is an equitable remedy to compel a person "who unfairly holds a property interest to convey such interest to the rightful owner." *Id.* (quoting *Scheid v. Scheid,* 239 N.W.2d 833, 837-38 (N.D.1976). A constructive trust is imposed to prevent the unjust enrichment of the person wrongfully interfering with the owner's possession of the property. *Id.* (citations omitted). See *McCarney v. Knudsen,* 342 N.W.2d 380, 385 (N.D.1983); *Scheid,* 239 N.W.2d at 838. In fact, Plaintiff did argue

constructive trust to the court. (Trans. p. 45 line 12-23). The lower court did not specifically address that theory of recovery.

C. The court erred in not allowing the Plaintiff to be heard on his motion for summary judgment. [3]

[¶23] In January 2019, Appellant wanted to set up a deposition for Mark Albrecht[4]. See Appendix p. 14, lines 1-8; p. 35-42. Mr. McNary, his attorney, would not respond to inquiries about available dates. Instead, Mr. McNary filed a motion to dismiss on February 8th. (It should be noted that the initial notice of motion served by Mr. McNary did not include a hearing date). On February 19th, 2019, the Appellant filed a motion for summary judgment. Appellant filed a response to the motion to dismiss which included a list of public documents referenced by Appellant (Appendix p. 33)

[¶24] The summary judgment motion was filed on the court by way of emailing it to Ms. Nancy Krueger with the intention of mailing it to the court once a date was received. The motion was ultimately mailed to the court and made part of the record on April 29th, 2019 in accordance with the discussion between the parties and the Court on March 8th, 2019. (Appendix p. 4-31)

[¶25] Prior to these events, Appellant had been told by the Court Administrators office that Odyssey was only used by Attorneys. It was not until sometime after the March 8th status conference that Appellant was told he did not need to be an attorney to use Odyssey. In addition, Ms. Kruger never raised an issue about other motion papers (Index #25) being emailed to her. On February 19th, 2019, Appellant called Ms. Krueger on two different occasions to get a hearing date for the motion for summary judgment. Ms. Kruger never did return the phone calls. Appellant was never given a date except for the May 1, 2019 date.

[3]The discussion of this issue is found in the Transcript p. 4-17

[4] The Appellant sent three letters to the court; one on or about February 12th , 2019; email in later February and on April 15th, 2019. They were to be part of the record of this court. Trans. p. 10 line 10-15. It is not clear whether they were actually made part of the record. Appendix p. 35-42)

[¶26] From the middle of January to the middle of April, Appellant sent the court three letters essentially requesting a status conference. (Appendix p. 35-42). It is not clear that the court even considered the letters. On May 1, 2019, Appellant, for the very first time, discovered that the court either did not see or get the letters. At that hearing, Appellant learned that no one even had a copy of the letters. In addition, it was not until the middle of May 2019 that Ms. Kruger even advised the Appellant that all communications with the court had to be done through motion. She said nothing about that issue prior to the hearing on May 1, 2019.

[¶27] It is not clear what Ms. Kruger did in response to receiving the emails or what the court did with the letter sent to the Court by way of mail. Appellant will just note that he did not receive any response from Ms. Kruger or the Court and that as of May 1, 2019, neither the Court nor Ms. Kruger had copies of the emails or the letter.

[¶28] In addition, on April 15th, the Appellant mailed a letter to the court advising the court that there was a great deal of confusion on what was happening on May 1, 2019. (See Appendix p. 41-42) Appellant sought clarification from the court on the issue. (Trans. of hearing dated May 1, 2019 p. 8 line 7-13; p. 21, lines 21-25 (hereinafter referred to as Trans.) The court did not respond in any fashion. Mr. McNary was emailed as well. Mr. McNary did not respond as well. (Trans. p. 8 line 14-23)

[¶29] There was a status conference on March 8th, 2019. (The transcript is attached as part of Appellant's Appendix p. 4-31.) The court, after the March 2019 hearing, issued a Notice of Hearing that stated that the *motions* shall be heard on May 1, 2019. (Trans. p. 15 line 4-8). (Appendix p. 32) When the appellant brought this up to the Court, the court dismissed it saying that the Notice was a standard form it uses. (Id line 9-15). The transcript is very clear that March 13th, 2019 hearing was continued to May 1, 2019 so that both motions could be

heard at the same time. (See Appendix p. 27-29). In accordance with this conference, Plaintiff served his motion for summary judgment on Mr. McNary on March 17th, 2019.

[¶30] It is still not clear to the Appellant why the court would continue the hearing date to allow Appellant to receive responses to discovery and to take the deposition of Mark Albrecht. (Trans. p. 43 line 2-5). In a motion to dismiss, neither depositions nor discovery can be used by the court; if it does, then the motion becomes a motion for summary judgment. (Trans. p. 9 line 23-25; p. 10 line 1-8.) The only reason for taking the deposition was to use the testimony of Mark Albrecht for Appellants motion for summary judgment. As it turns out, the Appellant was never given a hearing date nor was he allowed to proceed on his motion for summary judgment. [5] In addition, the court never did clarify itself as to which Rule it was proceeding under. Given the order of the court, he apparently proceeded under rule 12 (b) (6) and the summary judgment motion was never heard.

ISSUE II

WHETHER THE VERBATIM ADOPTION OF THE PERSONAL REPRESENTATIVES FINDINGS, CONCLUCIONS AND ORDER CLEARLY INDICATE THAT THE COURT FAILED TO EXERCISE ANY INDEPENDENT JUDGMENT

[¶31] After the hearing on this matter, the Court[6] asked the parties to submit proposed findings of fact, conclusion of law, and an order to him for consideration. Those documents were submitted to the court on February 1, 2019. On June 21, 2019, the court signed the document prepared by Mr. McNary. In reviewing the proposed findings and the document signed by the court, it is apparent that the court made absolutely no changes to the document submitted by Mr. McNary. The court used an exact version of the Personal Representatives proposed findings, conclusions and order as its own.

[5] Appellant hopes that other parties representing themselves are not subject to the same treatment.

[6] It should be noted that issue surrounding verbatim adoption was also raised in Supreme Court No 20190180 which is now before this Court. The judge in that case was Judge LeFevre as well.

[¶32] This court has said in the past that it does not approve of court's wholesale adoption of one party's proposed findings of fact. See *Schmidkunz v. Schmidkunz*, 529 N.W.2d 857, 858-59 (N.D. 1995); *Warner v. Johnson*, 213 N.W.2d 895, 898-99 (N.D. 1973).

[¶33] It is acknowledged that the wholesale adoption of findings, conclusion, and order does not automatically mean that the decision of the court should be reversed. This court has stated that if the findings adequately explain the basis of the court's decision, they will be upheld on appeal unless clearly erroneous. See *McDowell v. McDowell*, 2003 ND 174, ¶ 8, 670 N.W.2d 876; *Hendrickson v. Hendrickson*, 553 N.W.2d 215, 218 (N.D. 1996); *Schmidkunz*, at 858-59.

[¶34] However, the wholesale adoption of proposed findings does raise the question of whether or not the court independently evaluated the facts and analyzed the relevant law. It prevents a reviewing court from determining the extent to which the court's decision was independently made. It also creates the appearance of an improper delegation of the judicial fact-finding function to one party.

[¶35] In *In re Kinney*, 495 N.W.2d 69 (N.D.1993), this court stated that a trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner. This court put forward the following:

> A trial court acts in such a manner when its exercise of discretion is not the product of a rational mental process by which the facts of record and law relied upon is stated and is considered together for the purpose of achieving a reasoned and reasonable determination. Id.Citing *In re Altshuler*, 171 Wis.2d 1, 490 N.W.2d 1 (1992)

This court, with verbatim adoption, is given the seemingly impossible task of determining whether or not the trial court used its own rational mental process, using the facts and the law to achieve a reasoned determination, when the trial court simply signs an order which

constitutes the mental processes of counsel and the legal analysis of counsel who has a duty to advocate for his or her client. [7]

[¶36] When looking at this case in light of *In re Kinney*, supra, it is clear that the court did not consider the facts of record. It is also clear that the court applied law that contravenes the law in the State of North Dakota. Such erroneous arguments and statements of law clearly suggest that the court failed to exercise its own rational mental process in making its determination.

A. **The courts conclusions regarding the claim of unjust enrichment were in error**.

[¶37] The courts failure to exercise its own independent judgment in this case is highlighted by the courts analysis of the role that wrongdoing plays in the cause of action of unjust enrichment (See finding 13, page 3; Conclusion of Law 21, page 7) and in its conclusion that Sharleen Albrecht was free to sell the Franklin Account.

[¶38] Throughout the course of this litigation, the Defendant has repeatedly trumpeted, as though he were Gideon Wainwright, the notion that he is not liable because he did nothing wrong. (Trans. p 21, lines 21-25) He argued the same during the course of the March 8th, 2019 status conference. (Appendix p. 26 line 24-26) At the May 1, 2019 hearing, the court asked Mr. McNary the following question:

> "Under your theory of unjust enrichment, does it require any wrongful action by your client or not"? (Trans. p. 30 line 12-14)

Mr. McNary response was that it did not. (Trans. p. 30 line 15)

[¶39] Despite his verbal acknowledgment that wrongdoing on his clients' part had no relevance to unjust enrichment, Mr. McNary submitted legal arguments to the court urging the court

[7] In the opinion of this appellant, (UND; B.S. political science, magna cum laude) when any court simply rubberstamps proposed findings, etc. it minimizes the role of the judicial branch in our form of government. It was the goal of Thomas Jefferson that we be a nation of laws and reason. It is difficult to believe that a court applies its reason and the law when it merely rubberstamps the work of the opposing party to a conflict. Two words come to mind. Copy and Paste.

to dismiss the case because Mark did nothing wrong. He also submitted proposed findings of fact and conclusions that specifically highlighted the fact that his client did nothing wrong. [8] (Finding 13 p. 3; conclusion 21 p. 6). Further, the lower Court, despite the answer of Mr. McNary, made findings and conclusions that held Mark not liable because he committed no wrongdoing. For example, when the court concluded that there was no connection/agreement between Alan and Mark (reliance or inducement), or that Mark received no benefit from Alan, it was talking about wrongdoing. (Conclusion 21 p. 6). When analyzing the elements of an action for unjust enrichment, it is clear that wrongdoing plays no role.

[¶40] Unjust enrichment is an equitable doctrine, applied in the absence of an express or implied contract, to prevent a person from being unjustly enriched at the expense of another. *Home Insurance of Dickinson v. Speldrich,* 436 N.W.2d 1 (N.D.1989)

[¶41] The doctrine of unjust enrichment "is invoked when a person has and retains money or benefits which in justice and equity belong to another." *Midland Diesel Svc. & Engine Co. v. Sivertson,* 307 N.W.2d 555, 557 (N.D.1981) (quoting *Schlichenmayer v. Luithle*, 221 N.W.2d 77, 83 (N.D.1974)). "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." *Restatement of Restitution* § 1. For a complainant to recover, it is sufficient if another "has, without justification, obtained a benefit at the direct expense of the [complainant], who then has no legal means of retrieving it." *Midland*, 307 N.W.2d at 557

[¶42] The cause of action for unjust enrichment is based upon five elements. Those five elements include the following:

To recover under a theory of unjust enrichment one must prove five elements (1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the

[8] This raises the issue of whether or not Mr. McNary violated Rule 3.3(a)(1) North Dakota Rules of Professional Conduct. As stated in the comments to that section, legal argument based on knowingly false representations of law constitutes dishonesty toward the tribunal; the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

impoverishment; (4) absence of a justification for the enrichment and impoverishment; and (5) an absence of a remedy provided by law. *Zuger v. North Dakota Ins. Guar. Ass'n*, 494 N.W.2d 135, 138 (N.D.1992).

[¶43] A plain reading of those elements clearly shows that "wrongdoing" on the part of the Defendant plays no role. There is no case law that supports the contention that in order to prevail in a claim for unjust enrichment, the Defendant has to be guilty of some wrongdoing. To the contrary, this court in *Midland Diesel Services & Engine Company*, 307 N.W.2d 555 (ND 1981), [9] held that fraud or other misconduct on the part of the person alleged to have been unjustly enriched need not be shown. A complainant need not show fraud or other misconduct on the part of the recipient to recover. *Richland County v. State*, 180 N.W. 2d 649, 655 (ND 1970). Other courts have said the same. See *Green v. Green*, 433 N.E.2d 92 (Mass. 1982) (The lack of wrongdoing by the Defendant does not prevent the court from using its equitable powers. *Torchia v. Torchia*, 499 A.2d 581 (Pa. 1985) (The presence of wrongdoing is not required to establish an equitable interest to the proceeds.)

[¶44] The elements of the cause of action of unjust enrichment do not require the recipient to have done something wrong or offensive. The trial court's ruling adds that to the elements of unjust enrichment by indicating that the person enriched has to have committed some wrongdoing. (i.e, received a benefit, induced action or induced reliance) The elements of unjust enrichment only require a connection between the enrichment and the impoverishment and the connection, in this case, is very clear.

[¶45] In its conclusions, the court stated that:

> "… Plaintiff must show a connection between the enrichment and impoverishment; The Plaintiff must also demonstrate "the receipt of a benefit by the defendant from the plaintiff) (Conclusion 13, 20, 21). (Emphasis added)[10]

[9] It is worth noting that the Defendant actually cited the *Midland* case in the legal memorandum he submitted to the court in support of his motion to dismiss. Despite this, he still argued that Mark needed to have committed some wrong. He also cited the *Midland* case in arguments to the court. (Trans. P 25 line 24-25.)

[10] To the extent that the findings and conclusions of the court are really those of Mr. McNary, it is possible that Mr. McNary is in violation of Rule 3.3(a)(1) North Dakota Rules of Professional Conduct to the extent that the statement of the court is meant to imply that Plaintiff must show a connection between the plaintiff and the

"The complaint is devoid of allegations of any dealings between Alan and Mark that could have caused reliance by Alan or inducement by Mark. (Conclusion 21 page 6)

According to the court, the lack of a benefit received by Mark from Alan, or the lack of reliance by Alan on Mark, or the inducement by Mark, supports the conclusion that the requisite connection between the enrichment and the impoverishment was not shown. (Conclusion 13, 20). According to the Defendant, there must be dealings or a relationship or agreement between the Plaintiff and the Defendant whereby the Defendant received some benefit from the Plaintiff, or there must be some sort of relationship that caused reliance or inducement to enter into an agreement. (Trans. p. 26 line 22-25; p. 27 line 1-6; p. 30 line 15-16)

[¶46] The claim of unjust enrichment does not require reliance or inducement. What is required is that the Defendant receives something, which in justice, belongs to another. What is required is a connection between the impoverishment and the enrichment, not a relationship/agreement between the parties. As noted in *Zuger*, supra, unjust enrichment is applied to prevent a person from being unjustly enriched at the expense of another. In the cases cited by this Appellant in this brief, the courts all concluded that the recipient of the money at issue was unjustly enriched at the expense of a plaintiff. Frankly, none of those cases would exist if the defendant needed to receive a benefit from a Plaintiff. None of those defendants received a benefit from a Plaintiff; there was no reliance by a Plaintiff on the Defendant nor was there any inducement by the Defendant. Neither the actual beneficiary nor the court ordered beneficiaries did anything to each other or to anyone else. Frankly, in all likelihood, there was no interaction between the two different beneficiaries.

[¶47] Secondly, unjust enrichment does not require the type of relationship referenced by the court in its conclusions. (Conclusion 21). The court in *Gate City S. & L. Ass'n v*.

Defendant AND the receipt of a benefit by the defendant from the Plaintiff. That is not the status of the law on unjust enrichment in North Dakota.

International Bus. Mach. Corp., 213 NW 2d 888 (ND 1973) noted that if one obtains money or property of others without authority, the law, independently of express contract, will compel restitution or compensation. It noted that the substance of an action for `unjust enrichment' lies in the notion that the law will restore to the person entitled thereto that which in equity and good conscience belongs to him. No one needs to have received a direct benefit from the other, and there is no need for reliance or inducement.

[¶48] The court cites *Apache Corp v. MDU Resource Group*, 603 NW.12d 891 (ND. 1991). *Apache* supra, does not support the notion that the Defendant must receive something directly from the Plaintiff. The court in *Apache*, supra, laid out the elements of unjust enrichment very clearly.

[¶49] The Court in *Apache*, supra, actually held that following constitute the elements of unjust enrichment

1. An enrichment; 2. An impoverishment; 3. A connection between the enrichment and the impoverishment; 4. Absence of a justification for the enrichment and impoverishment; and 5. An absence of a remedy provided by law.

[¶50] Again, there is no mention of or reference to a connection or agreement or even interaction between a plaintiff and a Defendant. All that is required is a connection between the enrichment and the impoverishment.

[¶51] Other courts have found unjust enrichment claims to exist without there being the receipt of a benefit, reliance or inducement between the Plaintiff and the Defendant or some or other type of wrongdoing by the person who ultimately received the money. In these cases, the wrongdoing was committed by a person who was subject to a court order and a claim of unjust enrichment was made because of the death of the party subject to the court order.

[¶52] For example, in *Taylor v. Taylor*, 413 N.W.2d 587, 589 (Minn.Ct.App.1987), the father was ordered to maintain his children as beneficiaries. After remarrying, he named his

new wife as beneficiary. On appeal, summary judgment against the named beneficiary (the new wife) and in favor of the children was affirmed on the grounds that the new wife would be unjustly enriched if she were allowed to retain the proceeds. In that case, the new wife did nothing wrong nor was there some sort of interaction between the children and the new wife. That is, the Defendant did not receive something from the Plaintiff and there was no benefit, inducement and no reliance. See also *Thiebault v. Theibault*, 421 N.W.2d 747 (Minn. Ct App 1988).

[¶53] In *Graham v. Graham*, 465 S.E.2d 614 (W. VA. Ct of App. 1995) the court ruled that a spouse is precluded from changing the name of the beneficiary once a divorce proceeding is filed and there is an order precluding the disposition of marital assets As such, the assets needed to be returned to the status quo. In *Pierce v. Pierce*, 12 Kan. App.2d 810, 758 P.2d 252 (1988), aff'd, 244 Kan. 246, 767 P.2d 292 (1989), the court concluded that a divorce decree requiring a husband to maintain a life insurance policy with the minor children named as beneficiaries precluded the husband from changing beneficiaries, and as such, the minor children were entitled to the proceeds.

[¶54] In these cases, and countless others, there was no wrong doing on the part of the person who received the money at issue. The wrongdoing was committed by the party who was subject to the court order. There was no interaction or relationship between the party who received the money and the party that was court ordered to receive the money.

[¶55] The fact is that all the elements of unjust enrichment were established in this case.

1. ENRICHMENT

Mark was enriched in the amount of $28,074. This would be the amount of Plaintiff's share and Matthew Albrecht's share. Mark Albrecht would only have gotten $ 14,037.25 if the Franklin Templeton account had not been sold prior to the death of Sharleen Albrecht.

2. IMPOVISHMENT

[¶56] It is not disputed that if Sharleen Albrecht had not liquidated the Franklin Templeton account, upon her death, the funds at issue would have gone to Alan Albrecht and part would have gone to Matthew Albrecht. Plaintiff would have gotten $14,037.25 and Matthew Albrecht would have gotten the same amount. Instead, neither received anything.

3 CONNECTION BETWEEN ENRICHMENT AND IMPOVISHMENT

[¶57] The connection between the enrichment and the impoverishment is obvious. If Sharleen Albrecht had not liquidated the Franklin Templeton Account, upon her death, the Franklin Funds would have been split equally between her three sons. Defendant has acknowledged that if the funds had not been sold, that the money at issue would have gone in equal share to Matthew, Mark and Alan. The connection is that the enrichment lead to the impoverishment.

4 ABSENCE OF JUSTIFICATION

[¶58] There is a clear lack of justification for Mark to have received the benefits he received. He received the benefit by way of the prohibited actions of Sharleen Albrecht. The mere fact that her actions violated a court order precludes the possibility that there could be any justification for her actions. In addition, the Defendant has not put forward any justification for the actions of Sharleen Albrecht.

5. NO REMEDY AT LAW

[¶59] Plaintiff has no remedy at law. As pointed out by the Defendant, and as indicated by the Supreme Court, Plaintiff has no recourse against Sharleen Albrecht. Given the fact that Sharleen Albrecht passed away, bringing an action against Mark was not possible in the divorce action. In addition, the fact that these events were not discovered until after her passing made bringing a contempt action impossible. NDCC section 27-10-01.3, as cited by the Defendant, bars Plaintiff from a remedy at law. *In the Matter of the Estate of Sharleen*

Albrecht v. Glenvin Albrecht, 908 N.W. 2d 135 (ND 2018), establishes that Plaintiff has no remedy at law.

A. The lower court erred when it ruled that Sharleen Albrecht was free to liquidate the Franklin Fund despite the summons and the Interim order

[¶60] The failure to independently review the proposed submissions resulted in the court concluding that Sharleen Albrecht was free to sell the Franklin Templeton Account at issue prior to her death. As stated by the court, "since the account was not owned by Sharleen Albrecht at the time of her passing, Alan had no right to the funds in the account." (Conclusion 19). As concluded by the court, the Plaintiff could not prevail on the unjust enrichment claim because Sharleen had the right to liquidate the account prior to her death. (Conclusion 19). As argued by the Defendant, the summons and interim order did not prohibit her from liquidating the account. (Trans. p. 37 line 6-15)

[¶61] The Defendant admits that Sharleen liquidated the account. (Trans. p. 22 line 4-5, 21-22; p 35 line 21-25; p. 47 line 13-25) The letter from Franklin Templeton dated October 16, 2016 confirmed that the account was, in fact, liquidated on March 11, 2013 by Sharleen Albrecht. (Index #45)

[¶62] The court did not find her act of liquidating the account to be a violation of the summons and the interim order.

[¶63] At the same time, however, the court also made the opposite conclusion that the "Interim Order prevented disposal of or encumbrance of property . . ." (Conclusion 24).

[¶64] According to the conclusions made by the lower court, Sharleen Albrecht was free to dispose of the Franklin Fund because Glen Albrecht did not have an ownership interest in the Franklin Templeton account. As such, she was free to do what she wanted with the account. As stated by the Defendant, Sharleen was free to liquidate the account because it caused no harm to Glen (Trans. p. 24 line 6-9) and that the Summons was put into place only to protect Glen. (Trans. p. 38 line 1-6)

[¶ 65] The summons was quite clear. Neither party shall dispose of, sell encumber or dissipate pate any of the parties assets. The summons also requires an accounting within 30 days if you do so. Under North Dakota family law jurisprudence, all property, whether jointly owned or owned individually, is considered martial property. All assets, whether separately obtained or inherited property, are part of the marital estate. *Bladow v. Bladow*, 2003 ND 123, ¶ 6, 665 N.W.2d 724.

[¶ 66] The purpose of the Summons restraining provisions and Interim Order is to preserve the status quo during the pendency of a divorce. *Amerada Hess Corp v. Fulong Oil and Minerals Co*, 336 N.W.2d 129, 132, (Citing Gunsch v. Gunsch, 69 N.W.2d 739 (ND 1955). The restraining provisions exist to prohibit actions by either party that would dissipate the property of the marital estate or place property beyond the court's adjudicatory powers in the dissolution proceeding.

[¶67] The Summons and Interim Order applies to all assets and all policies no matter whether they were solely owned or jointly owned or whether Glen (or other spouse) was named as a beneficiary or whether someone else was named as a beneficiary. In addition, the notion that the summons was put into place in order to protect only Glen ignores the fact that maintaining the status quo impacts parties other than the other spouse. Other parties, amongst others, would include children of the parties covered by health insurance. Given the purpose of the summons as concluded by the court, the summons at issue would protect Glen Albrecht's health insurance coverage but it would not protect any covered children (assuming there were some) of the marriage because, according to the Defendant, the Summons is only meant to protect the other spouse.

ISSUE III

WHETHER SHARLEEN ALBRECHT WAS PROHIBITED FROM CHANGING THE BENEFICIARY ON THE FRANKLIN ACCOUNT GIVEN THE SUMMONS RESTRAINING PROVISIONS AND THE INTERIM ORDERS IN PLACE.

[¶68] In its conclusions of law, the court ruled that Sharleen was free to change the beneficiary of the Franklin Acct at any time. It did so because

a. Glen was not a joint owner of the account. (Conclusion 19 p. 5)

b Alan was not vested in the account.

c. The restraining provision of the Summons regarding changing beneficiaries only applies to health or life insurance; they do not apply to investment accounts. (Conclusion 22 p. 7; conclusion 23, p. 8; conclusion 24, p 7-8)

[¶69] Given the conclusions of the court, a party to a dissolution action would be free to change the beneficiary designation on a joint owned checking account because a checking account is not insurance. A party could change the POD on a jointly owned savings account since it is not insurance. (They are also not investment accounts). Given the conclusion of the lower court, a party to dissolution would be allowed to change the beneficiary on any asset that was not insurance or was not jointly owned.

[¶70] To be clear, Sharleen Albrecht did not call up Franklin Templeton and change the beneficiary on the annuity account. (Trans. p. 37 line 13-15). Instead, she changed the beneficiary when she liquidated the Franklin annuity and placed the funds in an account jointly owned between her and Mark Albrecht.

[¶71] The issue at hand was already addressed by this court in *In the Matter of the Estate of Sharleen Albrecht v. Glenvin Albrecht*, 908 N.W. 2d 135 (ND 2018). In discussing the decision of the lower court, this court stated that

> The context within which the district court concluded the assets remained in the marital estate was a part of the district court's conclusion that those actions did not violate the restraining provisions in the summons and interim order. We disagree. (Emphasis added)

The "actions" are the actions set forth below. The court then stated the following:

> The removal of Glenvin as a joint tenant and the designation of Mark as beneficiary upon her death can be considered to be both the dissipation of the **assets** and the encumbrance of the **assets**. Upon Sharleen's death, those **assets** did not remain part of the marital estate and ownership of those **assets** transferred from Sharleen to Mark. *** Sharleen's actions violated the restraining provisions in the summons and the interim order by dissipating and encumbering the marital assets. (Emphasis added)

[¶72] This court, when it made this statement, was addressing the following assets and actions.[11]

- Liquidated a jointly owned mutual fund; (this would be the jointly owned Franklin Acct.)
- Used the joint Franklin funds to purchase a different annuity in her name and named Mark beneficiary (This would be the ING account)
- exchanged an annuity she jointly owned with Glen (United Life Annuity) for an annuity naming herself as the sole owner (United Life Annuity) and made Mark the beneficiary
- Liquidated another annuity (United Life Annuity) solely in her name and used the funds to purchase a home which she titled jointly with Mark.

[¶73] The court, when it wrote in ***Estate of Sharleen Albrecht***, supra, was in fact talking about investment accounts. The jointly owned Franklin Account was, in fact, an investment account. The annuities are all investment accounts. The "assets" referenced included assets held solely in Sharleen's name. The investment assets in that case and the investment asset in this case were within the marital estate at the time of the divorce.

[¶74] The lower court apparently interpreted the above referenced language from ***Estate of Albrecht***, supra to mean that as long as Sharleen Albrecht owned the asset in her name only, she was free to do what she wanted with the asset. As stated by the Defendant, the summons did not preclude her from changing the beneficiary on separately owned investment accounts. (See Trans. p. 23, line 14-22). Apparently, the restraining language only applies only to jointly owned property.

[¶75] In addition, the lower court interpreted the language from ***Estate of Albrecht***, supra to mean that in order for there to be a violation, Sharleen needed to remove Glen as an owner and also, in addition, designate someone else as a beneficiary. (Conclusion 24 p. 8). As

[11] As noted by the Transcript, there was a lot of confusion about whether the account at issue was addressed by the court in Estate of Albrecht (Trans. p. 34, line 1-13; p. 37 line 16-19; p. 39 line 2-10;). It is not clear to the Appellant why it matters.

stated by the Defendant, in order for there to be a violation, Glen had to be removed and the beneficiary had to be changed. Mr. McNary stated that "It required both steps based upon the Supreme Court's analysis in that appeal." (Trans. p. 56 line 1-6).

[¶76] The conclusions of the Court all have to be analyzed in the context of the purpose of the Summons and Interim order. The purpose of those documents is to maintain the status quo. According to the conclusions of the lower court, the status quo does not apply to solely owned investment accounts. It only applies to life/health insurance. The status quo apparently does not apply if you change ownership *or* if you change the beneficiaries. You can do one or the other; you just cannot do both.

[¶77] It is true that in addition to the right to name beneficiaries, the insured usually also has the right to change beneficiaries. *See, Manikowske v. Manikowske,* 146 N.W.2d 880 (N.D.1966), clarifying *Manikowske v. Manikowske,* 136 N.W.2d 465 (N.D.1965) . It is also true that a P.O.D. beneficiary has no present interest in the account, no right to prevent the depositor from removing the account funds and effectively destroying the beneficiary designation, and no right to preclude the depositor from changing or removing the beneficiaries on the account. *In re Estate of Allmaras*, 737 NW 2d 612 (ND 2007.)

[¶78] However, it is also true that the right to name a beneficiary or to change the name of the beneficiary can be prohibited by court order. *Thomas v. Stone*, 2006 ND 59, 711 N.W.2d 199

[¶79] According to the Court, the summons did not preclude her from changing the beneficiary on investment accounts. There are other courts that have ruled that changing the beneficiary, on investment accounts, *after restraining order language was in place*, violated the temporary restraining orders.

[¶80] In *Webb v. Webb,* 375 Mich. 624, 134 N.W.2d 673 (1965), that court dealt with the change of the beneficiary on a retirement annuity contract. The restraining language at issue

prevented the parties from "dissipating, disposing of, encumbering, assigning or transferring any of the property of these parties whether owned jointly or individually." The court ruled that this injunctive language was sufficient to inform the enjoined party that he was restrained and that the injunction was sufficient to cover the wife's interest in the retirement annuity contract before the redesignation of the beneficiary. Also see *In Re Succession of* Jackson, 402 So.2d 753 (LA Ct. App. 1981) (divorce restraining order precluded party from changing beneficiary of annuity agreement).

[¶81] In *Titler v. State Employees Retirement Board*, 768 A.2d 899 (Pa. 2001), the court indicated that restraining language of a divorce summons prevented a party from changing the beneficiary of a retirement plan. In *Bartlett v. SunAmerica*, 2010 Ohio 1884 (2010), the court ruled that the change of beneficiary to an IRA was precluded by a temporary restraining order. The court noted that the judicial prohibition remained in effect at the time of the insured's death.

[¶82] *In Sande v. HD Investments Securities*, A07-1407, (Minn. Ct App 2008), that court dealt with the issue of the legal beneficiary of an IRA. In addressing the issue, the court stated that a beneficiary designation in a retirement account, such as an IRA, is equivalent to a beneficiary designation in a life insurance policy with respect to the impact of the dissolution upon the beneficiary designation.

[¶83] In Nicholas v. Nicholas, 277 Kan 171, 83 P.2d 214 (2004), that court concluded that the restraining order in place prohibited the divorcing parties from disposing of any asset except in the normal course of business. It noted that the temporary orders restrained the parties from changing (1) beneficiary designations on insurance policies; (2) joint tenancies to tenants in common; (3) transfer on death designations; or (4) pay on death designations."

[¶84] In *Briese v. Briese* 2012 MT 192, 285 P.3d 550 (2012) that court ruled that changing the beneficiary designation of a pension plan was invalid and void as a matter of law because

it violated the temporary restraining order issued in the marital dissolution proceeding. The question posed in that case was whether the language of the restraining order precluded "changing the beneficiaries of any insurance or other coverage" applied to a change of beneficiary of a pension plan. In the courts analysis, it found that the beneficiary designation of the pension plan was similar to a standard life insurance contract in that the payment was made upon the death of the insured to a "beneficiary" designated by the insured and it provided protection to the beneficiary in the event of the death of the insured. See 43 Am. Jur. 2d Insurance §§ 533. The death benefits inure to the beneficiary directly through the decedent's designation of the beneficiary. Since the beneficiary of the pension plan was "similar in nature" to life insurance, the temporary restraining order prohibited an attempt to change the designated beneficiaries of the pension plan during the proceeding.

[¶85] In *Estate of Allmaras*, 737 N.W.2d 612 (ND 2007), this court cited, with apparent approval, similar language from *Estate of Lahren*, 268 Mont. 284, 886 P.2d 412, 414 (1994). In *Lahren*, supra, that court stated that

> A P.O.D. designation provides that the beneficiary receives an interest in the CD *only at the death of the depositor.* The P.O.D. certificate of deposit is akin to an insurance policy…

[¶86] As stated in *Couch on Insurance* , Lee R. Russ & Thomas F. Segalla, 3d § 64.20 (1996):

> "`A temporary restraining order or injunction obtained in order to prevent an insured spouse from transferring property during pendency of divorce proceedings may also preclude the insured from changing beneficiary during pendency of suit, notwithstanding that no precise reference was made to life insurance policies. " (Emphasis added)

[¶87] The logic is compelling. A POD designation is similar to the designation of a beneficiary on a life insurance policy. *In the matter of Estate of Candice Westfall*, 942 P.2d 1227 (Colo. Ct. App. 1997). As a life insurance policy, the beneficiary could not be changed while the court orders remained in place. See *Thomas v. Stone*, 711 N.W.2d 199 (N.D. 2006); *Walstad v.Walstad*, 821 N.W.2d 770 (ND 2012); *Hirsch v. Travelers Insurance Co.*,

134 N.J.Super. 466, 341 A.2d 691 (1975). Further, the logic supports a conclusion that parallels the stated purpose of the summons and interim orders—to maintain the status quo during the course of the divorce litigation.

ISSUE IV

WHETHER THE LOWER COURT ERRED AS A MATTER OF LAW WHEN IT CONCLUDED THAT PLAINTIFF DID NOT HAVE STANDING TO BRING FORWRAD THIS SUIT.

[¶88] The court concluded that that Plaintiff had no standing. This was based upon the conclusions that:

a. The Plaintiff never had a vested interest in the account because Sharleen could have removed Alan as beneficiary at any time prior to her death. (Conclusions 30)

b. His rights (Alan) were not meant to be protected by the summons and interim order. (Conclusion 29, 30, 31).

c The account (Franklin Acct) did not exist at the time of Sharleen's death." (Conclusion 30) and, as such, he was not impoverished.

[¶89] A person cannot invoke the jurisdiction of the court to enforce private rights or maintain a civil action for the enforcement of those rights unless the person has in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. *State v. Rosenquist*, 78 N.D. 671, 51 N.W.2d 767 (1952).

[¶90] Standing analysis requires a two-fold inquiry: (1) plaintiffs must suffer some threatened or actual injury resulting from the putatively illegal action, and (2) the asserted harm must not be a generalized grievance shared by all or a large class of citizens, *i.e.,* plaintiffs generally must assert their own legal rights and interests and cannot rest their claim for relief on the legal rights and interests of third parties. *Kjolsrud v. MKB Mgmt. Corp.,* 2003 ND 144, ¶ 14, 669 N.W.2d 82; *State v. Carpenter,* 301 N.W.2d 106, 107 (N.D. 1980).

[¶91] Appellant would acknowledge, as a general rule, that one who is merely a possible beneficiary lacks standing to sue for the funds at issue. (*Lefkowitz v Lebensfeld*, 68 AD2d 488, 495, *affd* 51 N.Y.2d 442. A legatee has no vested right to funds at issue until the death of the testatrix. *Stowe v. Smith,* 184 Conn. 194, 198, 441 A.2d 81, [83] (1981). *Blair v. Ing* 21 P. 3d 452, 95 Haw. 247 (2001). A possible beneficiary is not vested and as such lacks standing to sue. *In Re the Estate of Jeffrey M. Johnson* 304 P.3d 614; 2012 COA 209

A. When the court order went into effect, Plaintiff became an irrevocable beneficiary of the Franklin account for as long as the court order remained in effect.

[¶92] When Sharleen Albrecht was precluded from liquidating the account or from changing the beneficiary of the Franklin account, Plaintiff became vested in the account. If nothing else, Plaintiff certainly had standing. When the court order went into effect, Plaintiff became an irrevocable beneficiary of the Franklin account for as long as the court order remained in effect.[12]

[¶93] Given the fact that the Franklin Annuity could not be sold and the beneficiary could not be changed, Plaintiff had a vested interest in the Franklin Templeton account. *Anderson v. Northern Dakota Trust Co*, 69 N.D. 571, 288 N.W.562 (1939). In *Anderson v. Northern & Dakota Trust Co,* supra, this court held that a person entitled to proceeds of a life insurance policy has a cause of action against the person who has wrongfully received the proceeds from the insurer and refuses to turn them over. (standing) This court ruled that when there is no right to change the beneficiary, the beneficiary has a vested interest in the asset at issue.

[¶94] Vesting in this case occurred at the time the court precluded Sharleen Albrecht from liquidating the Franklin Templeton account and from changing the beneficiaries on the account.

[12] Appellant still does not understand why no one mentions the part of the summons that required Sharleen to provide an accounting of the assets she sold.

[¶95] Other courts have made similar rulings. See *Standard Insurance v. Schwalbe*, 755 P.2d 802 (1988) (preliminary injunction of divorce proceeding gave vested interest to named beneficiaries); *Aetna Life Insurance v. Bunt*, 110 Wash. 2d 368, 754 P.2d 993 (1988) (beneficiaries had vested interest that could not be divested by change of beneficiary); *Fox v. Burden*, 603 N.W.2d 916 (S.D. 1999) (named beneficiaries had a vested interest); *Equitable Life Assurance Society v. Jones*, 679 F.2d 356 (4th Cir. Md. 1982) (named beneficiary had a vested interest in the proceeds); *Sparks v. Jackson*, 658 S.E.2d 456 (Ga. 2008); (When there is no right to change the beneficiary, the beneficiary has a vested interest in the asset at issue); *Willoughby v. Willoughby*, 758 F.Supp. 646 (D.C. Kan. 1990) (Since the husband was not allowed to change the beneficiary, the wife had a vested interest in the life insurance policy.)

[¶96] The "mere expectancy" of a beneficiary is converted into a vested interest when one party is required by court order to keep a life insurance policy in effect naming certain beneficiaries and is denied the right to change the beneficiary by court order. *Herrington v. Boatright,* 633 S.W.2d 781 (Tenn. Ct. App. 1982); *Goodrich v. Mass. Mutual Life Ins. Co.*, 34 Tenn. App. 516, 240 S.W.2d 263 (1951). Other courts have concluded that the court order created a vested interest in the named beneficiary which could not be altered by the insured. See *Campbell v. Prudential Ins. Co. of America* 73 Ohio Law Abs. 262, 137 N.E. 2d 515 (1955); *Bank One Trust Co.* v. *Transamerica Life Ins. Corp.* 5 Ohio App. 3d 236, 5 OBR 523, 451 N.E. 2d 542 (1982)

[¶97] Defendant has dismissed these cases on the grounds that court ordered restraining provisions or temporary orders are “different type of order” than a court ordered divorce decree. (Trans. p. 57 line 2-25; p. 58 line 1-21)

[¶98] As indicated in Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 58:11 (3ed. 2004) any person required to be named as beneficiary may enforce the obligation by

bringing an action to recover the proceeds of a policy under which another person is named beneficiary. That would include a spouse and adult issue.

[¶99] The conclusion of the lower court is apparently premised (apparently because there is no memorandum explaining its decisions) on *In re Estate of Allmaras*, 737 N.W.2d 612 (ND 2007). However, in *Allmaras*, supra, there was no court order. In this case, court orders existed that prohibited Sharleen Albrecht from changing the beneficiary of the Franklin Templeton account by liquidation of the account.(which was also prohibited)

B. The court's reliance on N.D.C.C. § 30.1-31-08(3) is misplaced. The statute has absolutely no relevance to the issue at hand.

[¶100] The court, in setting out its conclusions on the issue of standing, cited N.D.C.C. § 30.1-31-08(3) as authority. As argued by the Defendant, this statute creates a presumption that the beneficiary has no present ownership interest during the lifetime of the owner of the account. (Trans. p. 22 line 6-19). The courts reliance on this statute is misplaced.

[¶101] First, N.D.C.C. 30.1-31-07 (6-206) makes it clear that 30.1-31-08(3) only applies to controversies between parties and beneficiaries *and* their creditors and other successors; it does not apply to the right to payment as determined by the terms of the account.

Secondly, the statute does not take into account there being two court orders directing the parties to maintain the status quo.

ISSUE IV

WHETHER THE COURT RULED THAT THE SUIT BROUGHT BY APPELLANT WAS CONSIDERED A CONTEMPT ACTION AND WHETHER THE COURT WAS CORRECT IN DISMISSING THE SUIT BECAUSE IT WAS CLAIM FOR CONTEMPT

[¶102] The lower court's conclusions, 26, 27, 28 are odd in the sense that they really do not appear to be conclusions of law. Conclusion # 26 states that "to the extent Alan's claims could be construed as one for contempt of court . . . ". Conclusion 28 states that "Accordingly, to the extent Alan's claim is for contempt, it fails as (a) matter of law. It is not

clear whether the court was concluding that the suit was a contempt action. It never actually concluded that the claim at issue was, in fact, a contempt action. Despite that half-hearted conclusion, the court dismissed the case for that reason as a matter of law.

[¶103] As pointed out by the Appellant at the time of the hearing, there was nothing about the suit that made it remotely like a contempt action. (Trans. p. 44 line 19- 25; p. 1-23.) Certain procedures have to be followed for contempt to be found. There needs to be notice and a fair hearing. *Baier v. Hampton,* 417 N.W.2d 801, 805-06 (N.D.1987). *See Gerhardt v. Robinson,* 449 N.W.2d 802 (N.D.1989) (notice had been given that a purpose of the hearing was to enforce payment). In addition, there needs to be a hearing on whether or not there was an inability to comply with an order since inability is a defense to contempt proceedings. *Flattum-Riemers v. Flattum-Riemers,* 598 N.W.2d 499 1999 ND 146, ¶ 7, If nothing else, you do not serve a summons and complaint in an attempt to hold someone in contempt. Contempt is normally initiated by notice and motion in an existing case.

[¶104] The case at hand does not seek to hold anyone in contempt of court. Typically, in a contempt action, the relief requested involves the threat of jail unless something is done or undone. In addition, the Supreme Court has ruled that a contempt action would have to be brought in the case in which the contempt occurred. *In the Matter of the Estate of Sharleen Albrecht v. Glenvin Albrecht*, 908 N.W. 2d 135 (ND 2018). Given the fact that Sharleen Albrecht passed away before the facts germane to this case were discovered, and that the dissolution case was dismissed, Plaintiff could not bring an action seeking to hold someone in contempt. That is not what the Plaintiff is doing in this case.

[¶105] In considering this issue, the court should note that the relief sought in this case is against Mark Albrecht. It is against him because he is the one who benefited from the actions of Sharleen Albrecht. Neither Sharleen Albrecht nor the estate of Sharleen Albrecht benefited in any way.

[¶106] The Appellant previously cited a number of cases supporting the contention that the Appellant does have standing to bring forward this suit. *Anderson v. Northern & Dakota Trust Co*., 67 N.D. 458, 274 N.W.127 (1937); *Thomas v. Stone*, 711 N.W.2d 199 (N.D. 2006); *Walstad v.Walstad*, 821 N.W.2d 770 (ND 2012); *Hirsch v. Travelers Insurance Co.*, 134 N.J.Super. 466, 341 A.2d 691 (1975).

[¶107] The point of bringing these cases to the court's attention, once again, is this. If the Defendant's argument had merit, then the outcome of the cases above and others like it, would be substantially different. In each of the cases cited, one of the parties was prohibited from doing something. One of the parties acted in contravention of the court's orders. In each one of those cases, the wrong acting party died before the discovery of the wrongful conduct. According to the Defendant, all those cases would be just glossed over contempt actions and should have been dismissed. Instead, the beneficiary that was court ordered to remain in place prevailed.

[¶108] In addition, this action could be brought forward under any number of different theories. In either case, Plaintiff would still have to disclose the facts that establish Plaintiff's right to the funds. There is no way of describing the facts in this case and laying out the elements of a declaratory judgment action or an action for a constructive trust without noting the actions of Sharleen Albrecht. In doing so, however, the Plaintiff would not be turning those actions into a contempt action.

CONCLUSION

[¶109] It is clear that the trial court in this case made several findings of fact and conclusions of law that are clearly in error. It is asserted that those errors stem from the courts verbatim adoption of the work of the Defendant.

[¶110] The verbatim adoption of the work of the Defendant has lead the lower court to undermine the purpose of the summons restraining order and interims order and to carve out

exceptions that frankly, will hurt other litigants in the future and make the work of the courts that much more difficult.

[¶111] The lower court erred as a matter of law when in concluded that in order to prevail on a claim of unjust enrichment, the claiming party has to show that the Defendant committed some wrongdoing and received something from the Plaintiff. That is not the law in the State of North Dakota.

[¶112] The lower court also erred as a matter of law when it concluded that Sharleen Albrecht was free to sell the Franklin Acct. Given the courts other opposite conclusion, that the interim order did prevent disposal or the encumbrance of property, one is lead to believe that the summons and interim order only applies to jointly owned property. As concluded by the court, Sharleen was free to do so because she was the sole owner of the account and Glen Albrecht had no ownership interest in the account. That ruling must be reversed. The prohibition against selling property of the marriage, no matter how it is held, has been a fundamental tenant of domestic law jurisprudence for decades. It is recognized that circumstances may lead to the need to do so (necessities of life, generation of income). However, these circumstances can be addressed by way of advance disclosure, agreement between the parties or relief from the court. Even at that, there are no set of circumstances that would warrant not providing an accounting of the action.

[¶113] The lower court also erred as a matter of law when it concluded that Sharleen Albrecht was free to change the beneficiary by selling the Franklin Acct because the summons and the interim order only apply to insurance. The restrictions prohibiting parties from changing the status quo and moving assets beyond the reach of the court, according to the lower court, does not apply to investment accounts. This is another ruling that must be reversed. Appellant avers and invites this court to rule that any action that results in the

removal of or a change of beneficiary, of any asset of the marriage, whether jointly owned or solely owned, is prohibited by the summons restraining language.

[¶114] That ruling of the court, if affirmed, would mean that either party could change the beneficiary of any asset as long as it was not insurance. In addition, affirming the decision of the lower court would mean that any party may remove the other party as a joint tenant or change the beneficiary of jointly owned assets. A violation of the court order would only occur if you changed ownership and changed the beneficiary. Such a ruling needs to be reversed. Again, Appellant avers and invites this court to rule that any action that results in a change of or removal of a beneficiary on any asset of the marriage is prohibited. The court, by doing so, would add clarity to the proposition that such actions do, in fact, encumber or other dissipate the assets of the marriage which is already prohibited by the summons restraining language.

[¶115] Appellant asks this court to reverse the decision of the lower court; the Appellant asks this court to conclude that his claim for unjust enrichment was established. As such, the case should be remanded back for the lower court for a determination of damages and entry of judgment.

ORAL ARGUMENTS

[¶116] Appellee respectfully requests oral arguments be set as this case has a long procedural history. In addition, the decision in this case could substantially change the purpose and applicability of the summons restraining language and interim orders.

CERTIFICATE OF COMPLIANCE

[¶117] The undersigned, as the author of the above brief, hereby certifies, in compliance with Rule 32(e) and Rule 32(a)(8) of the North Dakota Rules of Appellate Procedure, that the total number of pages of the above brief does not exceed 38.

Dated this 24rd day of September, 2019.

/s/ Alan Albrecht

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