APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 22-1674

[Filed June 23, 2023]

Lisa Crain; Cathee Crain; Marillyn Crain Brody; Kristan Snell *Plaintiffs - Appellees*	)
v.	)
Shirley Crain *Defendant - Appellant*	)
Ray Fulmer, Executor of the Estate of H.C. Dude Crain, Jr. *Defendant*	)

Appeal from United States District Court
for the Western District of Arkansas - Ft. Smith

Submitted: January 12, 2023
Filed: June 23, 2023

Before GRUENDER, BENTON, and SHEPHERD, Circuit Judges.

SHEPHERD, Circuit Judge.

Years after their father's death, Lisa Crain, Cathee Crain, Marillyn Crain Brody, and Kristan Snell (collectively, Appellees) filed this diversity lawsuit against their stepmother, Shirley Crain, and the executor of their father's estate, Ray Fulmer, to adjudicate rights to property owned by their father and Shirley. Before the district court,[1] Appellees argued that their father, H.C. "Dude" Crain, Jr. (Dude), breached a property settlement agreement (PSA) that he entered into with their mother, Marillyn Crain (Marillyn), pursuant to Dude and Marillyn's divorce. The PSA—which the Logan County, Arkansas Chancery Court ruled was "contractual and nonmodifiable"—required Dude to maintain a will whereby he would leave "one-half of [his] estate" to Appellees. However, at Dude's death, no such will existed. Instead, Shirley took sole possession of Dude's separate property and retitled all jointly owned assets in her name. After ruling that Dude breached the PSA, the district court imposed a constructive trust over all property Dude owned immediately prior to his death—whether it was owned jointly with Shirley or separately. The district court then used the principles set forth in the Restatement (Third) of Restitution to equitably divide the property, valued at nearly $100 million. Shirley appeals, first arguing that the district court did not have subject matter jurisdiction and that Appellees do not have standing. Alternatively, Shirley argues that, even if this case is properly in

[1] The Honorable Timothy L. Brooks, United States District Judge for the Western District of Arkansas.

federal court, the district court committed numerous substantive errors. Having jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

Dude married Marillyn in 1954. Several years later, in 1960, Dude, Marillyn, and Dude's parents founded Crain Sales Company to manufacture foam products. Both Dude and Marillyn played important roles in growing the business. During that time, the couple had four children—Appellees—the only children of the marriage. However, as the business grew, Dude and Marillyn's relationship faltered, and by 1976, the pair had separated.

Years after their separation, in 1984, Dude started dating Shirley. Dude subsequently filed for divorce from Marillyn in the Logan County, Arkansas Chancery Court in 1988. By that time, Crain Sales Company, renamed Crain Industries, was a multimillion-dollar operation and had grown to become one of the largest private companies in Arkansas. In 1990, the business was reportedly earning annual revenues of $154 million. As a result, Dude and Marillyn had significant assets to divide in their divorce proceeding. To amicably divide their property, Dude and Marillyn entered into the PSA. Under this agreement, Dude received most of the couple's property. Indeed, Marillyn took no interest in the multimillion-dollar Crain Industries. However, Marillyn and Dude also "agree[d] to maintain in full force and [e]ffect a valid Last Will and Testament whereby each will leave at least one-half of their estate to [Appellees], per stirpes" (the Will Provision). The

Arkansas court examined the PSA, declared it "contractual and nonmodifiable," and incorporated it into its final divorce decree. Months after the divorce was finalized, Dude married Shirley, who had one son from a prior relationship.

Throughout their marriage, Dude and Shirley jointly owned real property, bank accounts, and investments. The couple also started and co-owned successful businesses in Northwest Arkansas. Ultimately, the pair amassed significant wealth in Arkansas. However, much of their wealth originated from Dude's sale of Crain Industries for $130 million in 1995. During their marriage, the couple also showered Appellees with gifts and other payments, including 2012 Christmas gifts of $1.6 million each, which were understood as "advances on their inheritance."

Despite the terms of the PSA, Dude did not engage in estate planning until 1993, when he executed a will that left nothing to Appellees and everything to Shirley. Almost twenty years later, Dude engaged an attorney to develop a new estate plan. Under the new, 2012 will, Shirley was to serve as the executor of Dude's estate upon his death, and in that role, was to create two trusts that would hold Dude's separate property: the Bypass Trust and the Marital Deduction Trust. The Bypass Trust was to benefit Appellees and Shirley's son, and would be funded with any assets available to pass through probate, free of estate taxes. The Marital Deduction Trust was to hold the rest of Dude's property, with Shirley serving as sole trustee and sole direct beneficiary. Appellees and Shirley's son were named as remainder beneficiaries. However, the

2012 will granted Shirley full discretion to pay herself as much of the net income and principal from the Marital Deduction Trust as she desired during her life. Dude executed a codicil shortly after which eliminated per stirpes inheritance, but the rest of the will remained unchanged. Shirley knew about this estate plan because she attended many of the meetings between Dude and his lawyer.

In 2014, Dude suffered a serious head injury in a fall. For the next three years, Shirley took on a much more active role in managing the couple's businesses and investments as Dude was largely incapacitated. Dude passed away in 2017. Neither Shirley nor Appellees opened a probate proceeding at that time. Further, contrary to the instructions in the 2012 will, Shirley did not create either of the trusts she was supposed to. Instead, Shirley took sole possession of Dude's separate property. Jointly owned property passed by operation of Arkansas law to Shirley.

Almost three years later, in March 2020, Appellees filed a petition to open an estate administration in the Circuit Court of Sebastian County, Arkansas. Initially, Shirley represented to Appellees that Dude's 1993 will was the operative will. The Arkansas court subsequently appointed Ray Fulmer as the executor of Dude's estate. Several months later, Shirley proffered Dude's 2012 will as the operative will. The Arkansas court eventually admitted the 2012 will to probate. This probate case remains ongoing.

Days after filing the petition to open an estate administration, Appellees filed this lawsuit against Shirley and Dude's estate in the United States District

Court for the Western District of Arkansas. The basis for federal jurisdiction was complete diversity of citizenship; Appellees are citizens of Texas, Dude's estate and Shirley are citizens of Arkansas, and the amount in controversy was well over $75,000. Appellees styled the claim primarily as a breach-of-contract action, alleging that they were third-party beneficiaries of Dude's promise to their mother to leave at least half of his estate to them. As a remedy, Appellees sought specific performance and the imposition of a constructive trust "on no less than one-half (1/2)" of Dude's property immediately prior to his death, including jointly owned property that had long since passed to Shirley by operation of Arkansas law.

On cross-motions for summary judgment, the district court ruled that Dude breached the PSA when he failed to leave Appellees at least one-half of his "estate," which the district court interpreted to mean all the property that Dude owned and controlled prior to his death—regardless of whether he owned it jointly or separately. The district court reasoned that specific performance of Dude's contractual promise was the appropriate remedy. However, since "the vast majority of the assets [Dude] enjoyed and controlled during the last two decades of his life were jointly owned with Shirley, either in tenancies by the entirety or in joint tenancies with right of survivorship," the district court struggled with how to give effect to the remedy. Eventually, the district court determined that, to achieve specific performance, it would impose a constructive trust on half of the property Dude owned and controlled up to the moment of his death. The district court then set the matter for trial for the

express purpose of identifying and valuing those assets to effectuate its proposed remedy.

Before trial, Shirley filed a "Motion for Clarification or Modification" regarding the district court's summary judgment order in which she argued, among other things, that the district court did not have subject matter jurisdiction to value any assets because of the probate exception to federal jurisdiction. The district court denied this motion in full and ruled that it had jurisdiction under Marshall v. Marshall, 547 U.S. 293 (2006), which reiterated that federal courts have the power "to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims.'" Id. at 310 (citation omitted).

In preparation for trial, the parties "stipulated to the identity and value of nearly all the assets Dude owned and controlled at his death, either individually or jointly with Shirley," and also stipulated to "which of th[o]se assets Shirley still possessed as of the date of trial." The district court then held a three-day bench trial. In a written order following the trial, the district court engaged in the substantial undertaking of identifying and valuing all of the assets Dude owned and controlled at his death, categorizing them by separate assets, joint assets, certain gifts, etc. The district court then went on to articulate its equitable determinations and conclusions of law. For assets subject to probate, the court merely "adjudicate[d] the parties' rights in such property and enter[ed] an order declaring such rights," deferring to the state probate court to administer the assets. For the much larger

portion of remaining assets, the court exercised its "legal and equitable powers" to determine the parties' rights. The district court awarded Shirley "an equitable right to ownership of 10%" of certain assets, before essentially dividing what remained down the middle referring to § 59 of the Restatement (Third) of Restitution. The district court also refused to credit any gifts made by Dude or Shirley to Appellees—including the 2012 Christmas gifts—reasoning that under 95 Corpus Juris Secundum § 176, a gift is not counted against a contractual obligation unless made by the promisor with reference to the contractual obligation. Ultimately, the district court imposed a constructive trust on nearly $100 million worth of property, much of which Dude and Shirley had owned jointly.

Following the trial, Shirley filed a motion to alter or amend the order and judgment. In this motion, she lodged a two-pronged attack. She first argued that Appellees lacked standing because they could not fairly trace their injury to anything she did or did not do. Next, Shirley argued that the probate and domestic relations exceptions barred jurisdiction. The district court denied this motion. Initially, it determined that Appellees had standing to sue Shirley because she was in wrongful possession of their property and owed them a duty to convey it back to them. Then, the district court reiterated its previous reasoning regarding the probate exception and ruled that the domestic relations exception did not apply since "[t]he case at bar involves a breach of contract claim and has nothing to do with divorce, alimony, child support, or child custody." Shirley also filed a motion for stay pending appeal, which the district court granted to a limited extent.

Shirley then requested a stay from this Court, which was denied.

Shirley appeals. Initially, she argues that the district court did not have subject matter jurisdiction and that Appellees do not have standing. In the alternative, Shirley argues that, even if this case is properly in federal court, the district court committed numerous substantive errors. We conclude that the district court had subject matter jurisdiction and Appellees have standing to sue Shirley. Further, we hold that Dude breached the PSA when he did not leave half of his estate to Appellees and the district court did not abuse its discretion in fashioning equitable relief. Thus, we affirm.

II.

Crucial to the proper functioning of our federal system is the longstanding maxim that "[f]ederal courts are courts of limited jurisdiction." Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). We may only exercise that jurisdiction authorized by the Constitution and by statute. Id. But equally as important is the principle that, when jurisdiction lies, federal courts have a "virtually unflagging obligation" to exercise it. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976). Here, the Appellees properly brought this suit in federal court based on diversity jurisdiction. Indeed, Appellees are citizens of Texas, Dude's estate and Shirley are citizens of Arkansas, and the amount in controversy is well over $75,000. See 28 U.S.C. § 1332(a) (diversity jurisdiction requirements). Nonetheless, Shirley argues that this

Court still lacks subject matter jurisdiction based on the probate and domestic relations exceptions.

"Among longstanding limitations on federal jurisdiction otherwise properly exercised are the so-called 'domestic relations' and 'probate' exceptions. Neither is compelled by the text of the Constitution or federal statute. Both are judicially created doctrines stemming in large measure from misty understandings of English legal history." Marshall, 547 U.S. at 299. Regardless of the origins of the exceptions, the Supreme Court has repeatedly upheld their application, although it has also cautioned that the exceptions are to be interpreted narrowly. Id. In this case, which involves the distribution of marital property between a new spouse and her deceased husband's estate, as well as the interpretation of an agreement incorporated into a divorce decree, both exceptions are implicated. But we hold that neither applies.

A.

We begin with the probate exception to subject matter jurisdiction. This exception:

> [R]eserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.

Id. at 311-12. Federal courts have authority "to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims.'" Id. at 310 (citation omitted). Indeed, as long as they do not interfere with the state probate court's possession of the property, federal courts are empowered to adjudicate the parties' rights in the property and enter an order declaring such rights. Id.

Here, this is exactly what the district court has done. Although there is an open, ongoing probate action in Arkansas state court, the district court has never attempted to interfere with that court's *possession* of any of the property at issue there. Rather, the district court adjudicated the parties' rights to the property and imposed a constructive trust on it. Therefore, we hold that the probate exception to subject matter jurisdiction does not apply.

B.

We now turn to the domestic relations exception. This exception "'divests the federal courts of jurisdiction over any action for which the subject is a divorce, allowance of alimony, or child support,' including 'the distribution of marital property.'" Wallace v. Wallace, 736 F.3d 764, 766 (8th Cir. 2013) (citation omitted). We have had limited occasion to analyze the domestic relations exception, but generally, we apply it only in narrow circumstances. See Lannan v. Maul, 979 F.2d 627, 631 (8th Cir. 1992). For example, in Kahn v. Kahn, 21 F.3d 859 (8th Cir. 1994), we applied the exception to an ex-wife's tort suit against her ex-husband because the conduct underlying

the tort claims was the same conduct that the state court had already considered in distributing the couple's marital property pursuant to their divorce. Id. at 861-62; see also Wallace, 736 F.3d at 767 (holding that exception applied to ex-husband's identity-theft tort claims against his ex-wife because state court had already considered the theft in distributing marital property pursuant to the couple's divorce, and therefore, any federal judgment would "modify the state court's marital distribution").

Our sister circuits have applied the exception in actions seeking the distribution of marital property but only when the parties to the action were former spouses. See, e.g., Irish v. Irish, 842 F.3d 736, 741-43 (1st Cir. 2016) (holding that exception applied to ex-wife's claims that ex-husband did not fully disclose his assets or deal in good faith during separation-agreement negotiations because "state courts are experts at dividing marital property" and the ex-wife's suit would require the federal court to re-apportion assets already divided in state court) (emphasis omitted); McLaughlin v. Cotner, 193 F.3d 410, 413 (6th Cir. 1999) (holding that exception applied to ex-wife's breach-of-contract claim against ex-husband because the contract was part of a separation agreement incorporated into a divorce decree). Of course, here, Shirley and Appellees are not former spouses.

Moreover, we did not apply the exception in Lannan v. Maul, which is much more analogous to the factual situation presented here. In Lannan, as part of a property settlement agreement incorporated into a final divorce decree, an ex-husband promised his ex-

wife to maintain a life insurance policy with their daughter named as the beneficiary. 979 F.2d at 628-29. Upon his death, however, the ex-wife discovered that their daughter was not the named beneficiary. Id. at 629. She then filed a claim against the ex-husband's estate on her daughter's behalf, seeking proceeds from a life insurance policy consistent with the property settlement agreement. Id. After the executor of the ex-husband's estate denied her claim, she filed a lawsuit in federal court alleging improper denial. Id. We held that the domestic relations exception did not apply as the issues presented did "not involve a domestic relations dispute between a feuding couple concerning a divorce, alimony, or child custody decree. Rather [they] concern[ed] a third-party beneficiary claim based on contract law." Id. at 631.

Similarly, here, the issues presented do not involve a domestic relations dispute between a feuding couple—both Dude and Marillyn have passed away. Instead, Appellees present a third-party beneficiary claim based in contract law, as in Lannan. Thus, we conclude that the domestic relations exception to subject matter jurisdiction does not apply.

III.

Having established subject matter jurisdiction, we now move to Shirley's claim that the Appellees lack standing because they cannot trace their injury to anything she did or did not do. Article III of the Constitution extends "[t]he judicial Power," only to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy."

Spokeo, Inc. v. Robins, 578 U.S. 330, 337 (2016). To establish standing Appellees must show that: (1) they have suffered an "injury in fact"; (2) that is "fairly . . . trace[able] to" Shirley's conduct; and (3) which is "likely" to be "redressed by a favorable decision." Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992) (alterations in original) (citations omitted). Since Appellees brought this suit in federal court, they have the burden of establishing standing. Agred Found. v. U.S. Army Corps of Eng'rs, 3 F.4th 1069, 1073 (8th Cir. 2021).

We are convinced that the Appellees have carried their burden. Shirley does not dispute the Appellees' establishment of the first and third requirements. Indeed, the Appellees have suffered a deprivation of their property rights, and this Court may redress that injury through equitable relief. Rather, Shirley focuses on the second element: traceability. More specifically, she argues that it is Dude who inflicted Appellees' injury when he failed to fulfill his contractual obligations. According to Shirley, then, since Dude caused the Appellees' injury, they do not have standing to sue her instead.

To satisfy the traceability requirement, Appellees' "injury has to be fairly . . . trace[able] to the challenged action of the defendant and not . . . th[e] result [of] the independent action of some third party not before the court." Lujan, 504 U.S. at 560 (alterations in original). "[T]raceability . . . requires the plaintiff to show a sufficiently direct causal connection between the challenged action and the identified harm. That connection cannot be overly attenuated." Agred Found.,

3 F.4th at 1073 (alterations in original) (citation omitted). Here, although Shirley did not breach the PSA, as she was not a party to it, she holds the property that the Appellees allege rightfully belongs to them under the agreement. Appellees' injury—the deprivation of their property rights—is thus directly traceable to Shirley's continued withholding of the property in violation of her equitable duty to convey it back to them. Because Appellees have suffered an injury in fact which is directly traceable to Shirley's conduct, and this Court may redress that injury by a favorable decision, we are persuaded that threshold standing requirements are satisfied.

IV.

Having overcome the barriers to federal jurisdiction, we now address the merits. Shirley argues that the district court erred in (A) interpreting "estate" in the PSA to mean all the property Dude owned prior to death, (B) imposing a constructive trust on the disputed property, and (C) making improper equitable determinations. "Because we are a federal court sitting in diversity, we apply the substantive law of the forum state" in analyzing these claims. Chew v. Am. Greetings Corp., 754 F.3d 632, 635 (8th Cir. 2014). Here, the parties agree that Arkansas law applies. Thus:

> We are bound by decisions of the Arkansas Supreme Court as to the meaning of Arkansas law. When the Arkansas Supreme Court has not addressed an issue, we must predict what rule the court would adopt and may look to the

> Arkansas Court of Appeals for guidance in this task.

Id. (alterations in original) (citations omitted).

A.

First, we determine the meaning of "estate" in the PSA. Below, the district court decided this legal question on cross motions for summary judgment. Thus, our review is de novo, viewing the facts in the light most favorable to Shirley. See id.

The PSA's Will Provision required Dude to "maintain in full force and [e]ffect a valid Last Will and Testament whereby [he would] leave at least one-half of [his] estate to [Appellees], per stirpes." On the one hand, Shirley argues that the plain meaning of "estate" is "probate estate" since the provision requires the parties to maintain a *will*, which necessarily disposes of property via probate. On the other, Appellees argue that "estate" means all the property that Dude owned and controlled prior to his death. We conclude the latter interpretation is more persuasive.

In Arkansas, "[t]he first rule of interpretation of a contract is to give to the language employed the meaning that the parties intended." Wal-Mart Stores, Inc. v. Coughlin, 255 S.W.3d 424, 429 (Ark. 2007). In effectuating this rule, courts "must consider the sense and meaning of the words used by the parties as they are taken and understood in their plain and ordinary meaning," as well as "the whole context of the agreement." Id. (citation omitted). "The best construction is that which is made by viewing the subject of the contract, as the mass of mankind would

view it, as it may be safely assumed that such was the aspect in which the parties themselves viewed it." Coleman v. Regions Bank, 216 S.W.3d 569, 574 (Ark. 2005).

The term "estate," in and of itself, is ambiguous. See, e.g., Wedin v. Wedin, 944 S.W.2d 847, 849 (Ark. Ct. App. 1997). However, we think that the parties' other uses of "estate" in the agreement as well as the agreement's context gives the word the meaning that Appellees attribute to it. Indeed, following the Will Provision, there is a paragraph stating, "all personal property of every kind and nature now in possession of each party shall, except as provided herein be his or her sole estate, free and clear of all claims or demands of the other." R. Doc. 38-2, at 7. In this paragraph, Dude and Marillyn use "estate" to mean "property" in its broadest sense—not just those properties that they might decide to leave pursuant to a will at death. Of course, we presume consistent usage throughout the agreement.

As to the context, at the time that Dude and Marillyn signed the PSA, Crain Industries—a business they both played major roles in growing—was reporting revenues in the tens of millions of dollars. Just a few years after their divorce, Dude sold Crain Industries and netted approximately $84 million. Despite Marillyn's seeming entitlement to at least a substantial share of this property, she took a comparatively humble sum under the PSA. Indeed, she kept the marital home (subject to its indebtedness), her Mercedes automobile, certain personal properties, bank accounts in her name, a $250,000 payment, and a

$1.5 million annuity. Dude kept the remaining, lion's share of the couple's property. Such discrepancies are often explained by one party's lack of representation or sophistication. But here, both parties were represented by counsel. The substantial discrepancy, then, leads us to believe Marillyn chose to forego her share in favor of the couple's children.

Moreover, Shirley's interpretation of "estate" to mean only "probate estate" is not persuasive. If estate had such a meaning, then Dude could easily circumvent the Will Provision. On the policy side, Shirley argues that interpreting "estate" to include all property which Dude owned prior to death effectively precludes the couple and those in similar situations from owning property jointly or by the entireties. But the Arkansas Supreme Court has already settled this question as a policy matter. See, e.g., Janes v. Rogers, 271 S.W.2d 930, 933 (Ark. 1954) (concluding that a contract to make a will "is applicable to property held by the spouses in an estate by the entirety, even though it would not pass under the will of either spouse but would devolve on the surviving spouse by operation of law"). Dude was free to do whatever he wanted with half of his property, including owning it jointly with Shirley, but the other half "was subject to and encumbered by the superior contractual rights of [his four] children." Gregory v. Est. of Gregory, 866 S.W.2d 379, 383 (Ark. 1983). To conclude, "estate" means everything Dude owned prior to death—whether he owned it separately or jointly with Shirley—and he therefore breached the PSA when he failed to leave half of this property to Appellees.

B.

Shirley next argues that, even if the district court properly determined that Dude breached the PSA, it erred in imposing a constructive trust because such a remedy is unavailable as a matter of Arkansas law and it is otherwise inappropriate under these circumstances. Appellant Br. 20, 46-47. "We review the district court's equitable remedies for an abuse of discretion," Triple Five of Minn. v. Simon, 404 F.3d 1088, 1095 (8th Cir. 2005), mindful that an error of law is necessarily an abuse of discretion, Menz v. New Holland N. Am., Inc., 440 F.3d 1002, 1005 (8th Cir. 2006) (citation omitted).

Initially, the district court concluded "that specific performance was the appropriate remedy for [Dude's] breach." R. Doc. 203, at 7. However, a difficult issue arose over how to effectuate this remedy since the Appellees did not file this lawsuit until three years after Dude's death. In the intervening period, Shirley sold or exchanged several of the assets, and many were no longer in their original form. The district court determined that the best way to effectuate specific performance of Dude's promise was to impose a constructive trust over all the assets he owned prior to death to prevent Shirley's unjust enrichment at Appellees' expense. Based on Arkansas law, we think this resolution was appropriate under these circumstances.

Indeed, the Arkansas Supreme Court has held that specific performance is the proper remedy when a party breaches a contract to make a will and that a beneficiary's right to property under a contract to make

a will supersedes the competing right of a joint tenant who acquires that property by operation of law. Janes, 271 S.W.2d at 933-34. Further, the same court has made clear that the imposition of a constructive trust is appropriate "where a person holding title to property is subject to an equitable duty to convey it to another on the ground that [s]he would be unjustly enriched if [s]he were permitted to retain it." Cox v. Miller, 210 S.W.3d 842, 848 (Ark. 2005). Putting these two concepts together, the district court properly reasoned that (1) Appellees' rights in the property that Dude held at the time of his death superseded the rights that Shirley acquired as a joint tenant and (2) without a constructive trust over this property, Shirley would be unjustly enriched by Dude's broken promise to leave half of his estate to Appellees.

Shirley's primary rebuttal is that the Arkansas Supreme Court has yet to unequivocally state that a constructive trust is an available remedy in a breach-of-contract action. She reasons that, since the Arkansas Supreme Court has held that the purpose of a constructive trust is to remedy unjust enrichment, and since "[t]here can be no unjust enrichment in contract cases," Stokes v. Stokes, 491 S.W.3d 113, 121 (Ark. 2016), a constructive trust is unavailable to Appellees as a matter of law. This may be true for a party who can claim the benefit of an express agreement. See Servewell Plumbing, LLC v. Summit Contractors, Inc., 210 S.W.3d 101, 112 (Ark. 2005). But see Carter v. Four Seasons Funding Corp., 97 S.W.3d 387, 402-03 (Ark. 2003) (concluding that "a constructive trust was an appropriate remedy" in case alleging breach of contract, even when defendants contended that this

was impermissible because plaintiffs had "an adequate remedy at law, damages"). But Appellees were beneficiaries of an agreement with *Dude*. They had no agreement with *Shirley*, the person in possession of substantially all of Dude's assets when he died. The district court did not encumber these assets with a constructive trust because Shirley breached the PSA; rather, it did so because Dude breached the agreement and thereby unjustly enriched Shirley at Appellees' expense.

Moreover, the Arkansas Court of Appeals approved of the imposition of a constructive trust in substantially similar circumstances as presented here. In Orsini v. Commercial National Bank, divorcees entered into a property settlement agreement pursuant to which the ex-husband was required to maintain a life insurance policy naming the couple's daughter as the beneficiary. 639 S.W.2d 516, 516 (Ark. Ct. App. 1982). After his death, however, it was discovered that he had breached the contract by naming his new wife as the beneficiary. Id. The Arkansas trial court held that the daughter was a "third-party beneficiary of the property settlement agreement incorporated into her parents' divorce decree" and was therefore entitled to the insurance proceeds. Id. at 517. The Arkansas Court of Appeals upheld the imposition of a constructive trust to prevent the unjust enrichment of the new wife, even absent traditional requirements like fraud or a confidential relationship. Id. at 518.

Likewise, here, the Appellees are the third-party beneficiaries of the PSA incorporated into their parents' divorce decree. Like the father in Orsini, Dude

breached his contractual obligation to the Appellees, allowing property which should have gone to them to pass to his new wife, Shirley. And as in Orsini, Shirley will be unjustly enriched absent the imposition of a constructive trust over the property, even if she has not done anything wrong. Cf. id. at 518 ("Innocent parties may frequently be unjustly enriched." (citation omitted)). Thus, since the Arkansas Supreme Court would likely approve of the imposition of a constructive trust under these circumstances, we find no abuse of discretion in the district court's decision to do so.

C.

Finally, Shirley takes issue with a variety of the district court's equitable determinations. In reviewing a judgment after a bench trial, "[w]e review the district court's grant of equitable relief for abuse of discretion and its factual findings for clear error." Kuehl v. Sellner, 887 F.3d 845, 852 (8th Cir. 2018). Following the bench trial, the district court shouldered the herculean task of identifying, tracing, and classifying all of Dude's tens of millions of dollars in assets—an undertaking which was particularly difficult given that several years had passed since Dude's death. After evaluating the reams of financial records, testimony, and other record evidence, the district court—in a thorough, 60-page order—undertook substantial factfinding and ultimately divided the property according to equitable principles set forth in the Restatement (Third) of Restitution and Corpus Juris Secundum.

Neither party alleges any error in the district court's decision to apply the Restatement and Corpus Juris Secundum. Thus, we do not evaluate the propriety of this decision, and we take no position on whether such reliance was appropriate under Arkansas law. Instead, Shirley argues that the district court committed a variety of errors in *how* it applied the Restatement and Corpus Juris Secundum.

Under the unique and particular circumstances of this case, a full and fair reading of the district court's thorough and well-reasoned order confirms that it did not abuse its discretion in making its equitable determinations. Even before dividing the property between Shirley and Appellees, the district court awarded Shirley a ten-percent share of the jointly owned property based on her role in growing the couple's wealth. Further, the district court took pains to evaluate each asset individually. For example, the district court did not award Appellees any additional interest in Regional Jet Center (one of Dude's and Shirley's businesses) because they already owned half of it. Certain jointly owned real properties were specifically deemed to be Shirley's alone because of her efforts in building or creating them. Ultimately, the district court undertook a massive, thorough, and reasoned approach to equitably dividing property between Shirley and Appellees. Its extensive order identifying, classifying, painstakingly tracing, and dividing these assets lay bare its dedication to doing justice among the parties in accordance with its wide discretion to fashion equitable relief. Cf. Kuehl, 887 F.3d at 854 (recognizing broad equitable powers of federal courts); see also Russell v. Russell, 430 S.W.3d

15, 20 (Ark. 2013) ("We have long recognized that circuit courts, in traditional equity cases, have broad powers to distribute the property in order to achieve an equitable division.").

We recognize that this case is unlike most that federal courts review. But the district court's refusal to apply persuasive authorities in the way Shirley would like them to be read does not establish that the district court abused its discretion in its equitable determinations, and we will not overturn them on this basis.

V.

For the foregoing reasons, we affirm the judgment of the district court.

SHEPHERD, Circuit Judge, concurring.

I write separately to note a lurking abstention issue unaddressed by the parties. Here, the parties have asked the federal courts to address rather complex issues of Arkansas law regarding property rights, the division of marital property, and probate matters. Courts have considered abstaining from exercising their jurisdiction in similar circumstances. See, e.g., Kahn, 21 F.3d at 861 ("[W]hen a cause of action closely relates to but does not precisely fit into the contours of an action for divorce, alimony or child custody, federal courts generally will abstain from exercising jurisdiction."); Deem v. Dimella-Deem, 941 F.3d 618, 625 (2d Cir. 2019) (abstaining when claims were "at least 'on the verge of being matrimonial in nature' and [we]re capable of being fairly resolved in state court"). However, recognizing our "virtually unflagging

obligation" to exercise jurisdiction where it lies, Colo. River Water Conservation Dist., 424 U.S. at 817, I concur in the majority's refusal to review this issue sua sponte.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

CASE NO. 2:20-CV-2038

[Filed March 31, 2022]

LISA CRAIN; CATHEE CRAIN; MARILLYN CRAIN BRODY; and KRISTAN SNELL
PLAINTIFFS
V.

SHIRLEY CRAIN and RAY FULMER, as Representative of the Estate of H.C. "Dude" Crain, Jr., Deceased
DEFENDANTS

MEMORANDUM OPINION AND ORDER

Separate Defendant Shirley Crain has filed a Motion to Alter Judgment (Docs. 231 & 242) and a Motion to Stay Judgment Pending Post-Judgment Motion and Appeal (Doc. 218). For the reasons discussed below, the Motion to Alter Judgment is **DENIED**, and the Motion to Stay Judgment Pending Post-Judgment Motion and Appeal is **GRANTED IN PART AND DENIED IN PART**.

I. BACKGROUND

The Court incorporates by reference the factual and procedural history of the case as set forth in its order on summary judgment (Doc. 147) and its Findings of Fact, Conclusions of Law, and Rulings (Doc. 203) issued following the bench trial of this matter. The following facts are included only to give context to the Court's rulings below; they are not meant to be detailed or exhaustive.

Plaintiffs are four sisters who sued their stepmother, separate Defendant Shirley Crain, and the probate estate of their father, H.C. "Dude" Crain, Jr., to enforce a contract Dude made with Plaintiffs' mother, Marillyn. Dude and Marillyn divorced in 1989, and as part of their property settlement agreement ("PSA"), they promised to make wills that would leave at least half the property they owned and controlled at the time of their deaths to their children, the Plaintiffs. It was undisputed that the PSA was a valid and enforceable contract to make a will. It was also undisputed that Dude's operative will, as amended, was the one he made in 2012. The threshold dispute was a legal one: whether the terms of Dude's 2012 will satisfied his contractual obligations under the PSA. On cross motions for summary judgment—where the parties agreed that all pertinent facts were undisputed—the Court ruled in Plaintiffs' favor, finding that:

> Because Dude failed to engage in appropriate estate planning that would have left at least half of his estate to the Plaintiffs, he breached the promise he made to Marillyn as memorialized in

> the PSA. The breach here is obvious; it is not a close call. The remedy is specific performance of the PSA's will provision. *See Janes v. Rogers*, 271 S.W.2d 930, 934 (Ark. 1954) (finding that the appropriate remedy for breach of contract to make a will is specific performance).

(Doc. 147, p. 12).

However, by the time Plaintiffs brought suit, Dude had been dead approximately three years. In the interim, Shirley had taken sole possession and control of all assets that Dude had owned and controlled at the time of his death. Thus, as the Court explained in its summary judgment opinion, the only way to effectuate the contract's terms and achieve specific performance was to impress a constructive trust over the assets subject to Dude's contractual obligation:

> "A constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that [she] would be unjustly enriched if [she] were permitted to retain it." *Cox v. Miller*, 210 S.W.3d 842, 848 (Ark. 2005). "The duty to convey the property may arise because it was acquired through . . . wrongful disposition of another's property." *Id.* at 849. A constructive trust has the effect of converting the person with the duty to convey "'into a trustee for the parties who in equity are entitled to the beneficial enjoyment.'" *Davidson v. Sanders*, 357 S.W.2d 510, 517 (Ark. 1962) (quoting Black's Law Dictionary, 4th Edition). Therefore, the Court will impress a constructive trust on half the

> property Dude owned and controlled up to the moment of his death, (as well as any post-death interest, earnings, or proceeds), with the value of such to be determined at trial.

Id. at pp. 16–17.

During a three-day bench trial in July of 2021, the Court heard evidence regarding the nature and character of the assets subject to the constructive trust. The trial was also Shirley's opportunity to put on proof in support of her affirmative claim to a beneficial and/or equitable interest in the disputed assets. Following post-trial briefing, the Court entered its Judgment (Doc. 204) on January 18, 2022, impressing a constructive trust on the assets set forth in the Court's Findings of Fact and Conclusions of Law (Doc. 203).

There were two broad categories of assets at issue: those Dude owned *individually* and those Dude held *jointly* with Shirley. In impressing the constructive trust, the Court first identified the property that Dude owned and controlled individually at the time of his death. *See id.* at pp. 10–15, 50–51. Then, citing *Marshall v. Marshall*, 547 U.S. 293, 310 (2006), the Court explained why it had jurisdiction to adjudicate Plaintiffs' rights and interests in these assets, while at the same time recognizing that the Sebastian County Probate Court had exclusive authority to possess, administer, and transfer these assets through the probate process. *See* Doc. 203, pp. 37, 50–51. The Court's Judgment ordered Shirley to deliver these assets to Ray Fulmer, the Administrator of Dude's estate, who is a named defendant in this action, too.

Next, the Court identified and impressed a constructive trust over property Dude owned jointly with Shirley, as husband and wife, at the time of his death. *See id.* at pp. 17–32, 52–59. These assets were not subject to probate. Shirley, as trustee of the constructive trust, was ordered to deliver Plaintiffs' interest in these assets (or their dollar-value equivalent) directly to Plaintiffs.

On February 3, 2022, Shirley filed a Motion to Stay Pending Post-Judgment Motion and Appeal (Doc. 218). On February 11, Plaintiffs filed a Response (Doc. 221) opposing the stay as to all assets subject to the constructive trust. On February 15, Administrator Fulmer, on behalf of Dude's probate estate, filed a Response (Doc. 230) opposing the stay with respect to Dude's individually owned assets. The parties then filed replies and sur-replies (Docs. 223, 226, 227 & 238), and the Motion to Stay is now ripe for resolution.

On February 15, 2022, Shirley timely filed a Motion to Alter Judgment (Doc. 231). The incorporated brief in support was more than twice the length permitted by the Court's scheduling order. The Court directed Shirley's counsel to cut 30 pages and refile it.[1] Shirley

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[1] Two days after Shirley filed her Motion to Alter Judgment, Plaintiffs moved to strike the overly long supporting brief. *See* Doc. 232. Plaintiffs correctly pointed to the Court's scheduling order (Doc. 73), which required *briefs* in support of motions to be no more than 25 pages. Shirley's filing was a 55-page combined motion with incorporated brief in support. The motion portion of the document was a single paragraph that consumed less than one page. *See* Doc. 231.

refiled a shorter version of the brief on March 1. *See* Doc. 242. Plaintiffs filed a Response in Opposition (Doc. 244) on March 7, making the Motion ripe. Below, the Court will first take up the Motion to Alter Judgment and then address the Motion to Stay.

II. DISCUSSION

A. Motion to Alter Judgment

Shirley's Motion to Alter Judgment is based on Rules 52 and 59. Rule 52(b) states that on a party's motion, "the court may amend its findings—or make additional findings—and may amend the judgment accordingly." Such a motion "may accompany a motion for a new trial under Rule 59." Fed. R. Civ. P. 52(b).

The Court declined Plaintiffs' invitation to strike the entire document. Instead, the Court ordered Shirley's counsel to cut 30 pages of briefing and refile it. *See* Doc. 241. Shirley filed the amended version on March 1. *See* Doc. 242. The original brief and the shorter brief contain identical substantive arguments; the difference is that the shorter brief is more concise and helpful. On March 7, Plaintiffs filed a response (Doc. 244) to Shirley's pared-down brief. That same day, Plaintiffs separately objected to the Court's remedy, *see* Doc. 243, arguing that the shorter version of Shirley's motion was untimely as a matter of law under Rule 52(b) or 59(e) because it was filed more than 28 days after the Judgment was entered.

Plaintiffs' frivolous objection is not well received. The Court did not strike Shirley's timely filed *motion*. Rather, the Court struck Shirley's "*brief* in support" and granted her leave to "*re*file" a 30-page-shorter "brief." (Doc. 241, p. 2) (emphasis added). Moreover, the Court's order required the refiled brief to contain the same content, just less of it. *See id.* Plaintiffs' Objection (Doc. 243) is therefore **OVERRULED**.

Rule 59(e) contemplates the filing of a "motion to alter or amend a judgment."

A Rule 52 motion "cannot be used to raise arguments that could have been raised prior to the issuance of judgment." *Diocese of Winona v. Interstate Fire & Cas. Co.*, 89 F.3d 1386, 1397 (8th Cir. 1996). Similarly, "Rule 59(e) motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to the entry of judgment." *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 934 (8th Cir. 2006) (internal citations and quotations omitted).

Shirley's Motion to Alter Judgment raises legal arguments that Shirley's trial counsel either: (1) presented to the Court before judgment, but were rejected (for reasons stated in the Court's written orders) or (2) could have been presented before judgment by Shirley's trial counsel—but were not.[2]

1. Standing

Shirley's first argument is that Plaintiffs lacked standing to bring this lawsuit against her because she was not a party to Dude and Marillyn's contract and did not cause Plaintiffs any injury. This argument is raised for the very first time on motion for *post-judgment* relief, which the Court finds odd and

[2] Shirley added new lawyers to her legal team after the Court filed its Findings of Fact and Conclusions of Law. The new lawyers are the ones who filed the Motion to Alter Judgment. For the most part, Shirley's new lawyers have me rely reframed the previously rejected legal arguments that were made by her trial counsel.

disingenuous. Nevertheless, the Court must consider issues going to its subject matter jurisdiction regardless of their timeliness.

"In a diversity case, a court will not address a plaintiff's claims unless the plaintiff meets the 'case or controversy' requirements of article III of the Constitution and also has standing to sue under the relevant state law." *Wolfe v. Gilmour Mfg. Co.*, 143 F.3d 1122, 1126 (8th Cir. 1998) (quoting *Metropolitan Express Servs., Inc. v. City of Kansas City,* 23 F.3d 1367, 1369–70 (8th Cir. 1994)). To establish Article III standing to sue Shirley, Plaintiffs must demonstrate:

> (a) the invasion of a legally protected interest which is both concrete, and actual or imminent;
>
> (b) a causal connection between the injury and the conduct complained of; and
>
> (c) the likelihood that the injury will be redressed by a favorable judicial decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

For the purposes of this Motion, Shirley does not dispute that Plaintiffs suffered an injury in fact. Instead, she argues that Plaintiffs cannot fairly trace their injury to anything Shirley did or did not do, so they have no standing to sue her. The Court disagrees. Shirley was named a defendant in this lawsuit based on allegations that she held and claimed legal title to assets that Plaintiffs were seeking to impress with a constructive trust. *See* Plaintiffs' Second Amended Complaint, Doc. 38. In other words, Plaintiffs were

seeking to establish and then foreclose upon an alleged equitable interest to real and personal property in Shirley's possession and control.

Plaintiffs' contended they are third party beneficiaries and had "a legally protected interest" in assets that were subject to the PSA's will provision, and that Shirley invaded that interest and deprived them of the use and enjoyment of the assets—albeit perhaps unknowingly[3]—when she took possession of them upon Dude's death. Because Dude died in 2017 and could no longer perform under the contract, Plaintiffs alleged that a constructive trust was necessary to avoid Shirley's unjust enrichment at their expense and to prevent further injury caused by Shirley's continued, unlawful possession of the assets. *See* Doc. 38, pp. 9–10.

The equitable relief sought by Plaintiffs against the property and proceeds in Shirley's possession is well grounded in Arkansas law. The Court found that Dude (not Shirley) had breached the PSA, but even so, under Arkansas law, Shirley was in wrongful possession of Dude's property. The Court further found that Shirley owed Plaintiffs "[t]he duty to convey the property" as "trustee for the [Plaintiffs] who in equity are entitled to the beneficial enjoyment." (Doc. 147, p. 17) (citations omitted).

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[3] The Court accepted "at face value" Shirley's assertion at trial that she was "unaware of Dude's contractual obligations under the PSA until Plaintiffs filed this lawsuit against her and Dude's estate on March 27, 2020." (Doc. 203, p. 34).

The Court therefore now concludes that Plaintiffs had standing under federal law to sue Shirley. Plaintiffs suffered a concrete, actionable injury—the deprivation of their property rights and loss of the use and enjoyment of their property—which was causally linked to Shirley's action and/or inaction and was directly traceable to Shirley. Plaintiffs filed suit against Shirley to redress the injury and prevent Shirley's unjust enrichment.

Plaintiffs also had standing to sue Shirley under state law. "Arkansas law on 'standing' states that a person or party who has a pecuniary interest in the outcome of the action has standing to assert a claim on his or its behalf." *First United Bank v. Phase II*, 347 Ark. 879, 893 (2002). Plaintiffs had a pecuniary interest in the outcome of this action, and Shirley was a necessary party to this suit.[4] "[T]he sweep of unjust enrichment is broad enough so that a constructive trust may also be imposed against an innocent party, provided that the innocent party would be unjustly enriched vis-a-vis the plaintiff." Howard W. Brill & Christian H. Brill, 1 *Ark. Law of Damages* § 20.5 (6th ed.).

2. Subject Matter Jurisdiction

Next, Shirley revisits a previously rejected argument about subject matter jurisdiction. She

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[4] Shirley never challenged the Court's personal jurisdiction over her as a necessary party to this lawsuit, and it is too late to raise that challenge now. *See Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) (finding personal jurisdiction is waived by either express or implied consent).

contends the state probate court is the only court that may adjudicate this breach of contract dispute. The Court disagrees and has already explained its reasoning. *See* Doc. 167, pp. 11–12; Doc. 203, pp. 37 & 50 n.12. In the alternative, Shirley argues that the only tribunal with subject matter jurisdiction over the dispute is the state domestic relations court that ratified Plaintiffs' parents' divorce decree and PSA. The will provision of the PSA does contemplate the domestic relations court retaining jurisdiction of the case "for the purpose of adjudicating and awarding *to the parties* their interest and rights to and in the property and property rights." (Doc. 38-2, pp. 2–3) (emphasis added). But, obviously, the Plaintiffs were not parties to the contract. The parties were Plaintiffs' parents, who were dead by the time Plaintiffs filed suit for breach of contract.

Regardless, at no point did the domestic relations court have exclusive jurisdiction over this dispute. The Supreme Court has held that the domestic relations exception to federal jurisdiction is not intended "to strip the federal courts of authority to hear cases arising from the domestic relations of persons unless they seek the granting or modification of a divorce or an alimony decree." *Ankenbrandt v. Richards*, 504 U.S. 689, 701 (1992). The case at bar involves a breach of contract claim and has nothing to do with divorce, alimony, child support, or child custody. It follows that this Court properly exerted subject matter jurisdiction over the suit pursuant to 28 U.S.C. §1332(a), as the parties are fully diverse and the amount in controversy exceeds the jurisdictional minimum for federal court.

3. Appropriateness of Remedy

Third, Shirley repeats an argument her trial counsel made—more than once—prior to judgment: that a constructive trust is an inappropriate remedy for Dude's breach of contract. The Court refers Shirley's counsel to its prior reasoning on the subject. *See* Doc. 147, pp. 16–17; Doc. 167, pp. 4–6. Shirley also repeats her claim that she is under no duty to convey any property to Dude's estate Administrator or to Plaintiffs because she is "innocent" of any malfeasance. The Court addressed this argument in its Findings of Fact and Conclusions of Law. (Doc. 203, pp. 33–37 & 45–49).

4. Summary Judgment Rulings on Liability

Fourth, Shirley seeks to relitigate the issues raised on summary judgment concerning Dude's liability for breach of contract. The Court remains unpersuaded. *See* Doc. 147.

5. Fairness of the Court's Findings

Fifth, Shirley protests she "is left with a larger liability in restitution than that which the Restatement deems appropriate." (Doc. 242, p. 14). The Court disagrees and refers Shirley's counsel to the Findings of Fact and Conclusions of Law for the Court's explanation. *See* Doc. 203, pp. 45–49.

6. Arguments in Favor of Setoff

Sixth, Shirley disagrees with how the Court resolved the contentious issue of the 2012 Christmas gifts. At trial, Shirley presented *no evidence* that Dude

intended the 2012 Christmas gifts to satisfy his contractual obligations to Plaintiffs. The Court's Findings of Fact and Conclusions of Law explain that Plaintiffs understood these gifts were advances on their inheritance; however, there was no proof—even indirect or circumstantial proof—linking Dude's contractual obligation under the PSA to the 2012 Christmas gifts. Plaintiffs are correct that their father could have left them *more* than half of what he owned and controlled at the time of his death (more than the contract required) if he so chose, and the Court is not prepared to simply assume, absent any evidence, that his true intention was to credit the Christmas gifts against his contractual obligation. *See* Doc. 203, p. 49.

Finally, Shirley presents new evidence, not raised at trial, that she is entitled to further credits and setoffs. The Court declines to consider this evidence as it is not actually "new" but was well known to Shirley prior to trial and could have been raised then, or in post-trial briefing prior to judgment.[5] As for Shirley's

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[5] Shirley argues for the first time that the Court should have assumed a different valuation for certain assets—one that took into account her estimated payment of brokerage fees, management fees, personal property taxes, and capital gains taxes. Shirley did not present any specific testimony at trial about how much she paid in fees and taxes to offset the value of any personal or real property, nor did she focus the Court in post-trial briefing on how to calculate these figures. What Shirley *did* do was file a joint stipulation, along with Plaintiffs, as to the value of most of the assets, including all the real property, and the Court relied on these figures. *See* Doc. 165. It is not the Court's burden to comb through notebooks full of tax returns, stock spreadsheets, and bank statements to figure out if Shirley was entitled to any offset

complaints concerning the Court's methodology for tracing, apportioning, and valuing the disputed assets, the Court declines to reconsider its ruling or else finds that Shirley waived these objections prior to the entry of the Judgment.[6]

The Court issued findings of fact and conclusions of law that took into account the credibility of the witnesses who testified at trial and considered all facts in the trial record, the legal issues presented by the parties, and the voluminous post-trial briefing. The Court even offered the parties an opportunity to identify clerical and mathematical errors in its findings before entering the Judgment. *See* Doc. 203, p. 1 n.1. At this point, the Court's work is finished, and Shirley's next step is to appeal. For all these reasons, the Motion to Alter Judgment under Rules 52 and 59 is **DENIED**.

B. Motion to Stay Judgment Pending Appeal

Shirley has separately moved for a stay of judgment pending the outcome of her forthcoming appeal (Doc. 218). It is not entirely clear whether a stay is sought with respect to Dude's *separate* assets (that Shirley was ordered to deliver to the Administrator of

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or credit she failed to raise. "Judges are not like pigs, hunting for truffles buried in [the record]." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)

[6] The Court explained in its Findings of Fact and Conclusions of Law, (Doc. 203, p. 8), that "[b]efore the bench trial, the parties stipulated to the identity and value of nearly all the assets Dude owned and controlled at his death, either individually or jointly with Shirley." *See also* Doc. 165, Parties' Joint Stipulation.

Dude's probate estate), or whether the stay is focused on the assets that Dude held *jointly* with Shirley at the time of his death.[7] Regardless, Plaintiffs and Separate Defendant Ray Fulmer object. The Court will therefore address both categories of assets below, after first addressing the legal considerations.

In ruling on a motion to stay, the Court must consider the following four factors: (1) the likelihood of the movant's success on the merits; (2) whether the movant will be irreparably harmed absent a stay; (3) whether issuance of the stay will substantially injure the non-moving party; and (4) the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Shrink Mo. Gov't PAC v. Adams*, 151 F.3d 763, 764 (8th Cir. 1998).

The Eighth Circuit directs the Court to "consider the relative strength" of these factors. *Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011). While the "most important factor is the [movant's] likelihood of success on the merits," the Court is tasked with balancing *all* the factors, which means that "[c]lear evidence of irreparable injury should result in

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[7] Shirley's Motion to Stay discusses the irreparable harm she will suffer if presently forced to deliver to Plaintiffs the constructive trust portion of Dude's jointly held assets, *i.e.*, those assets listed in Tables 2–5 of the Court's Findings of Fact and Conclusions of Law, Doc. 203, pp. 52–59. Shirley does not, however, substantively explain how or why she would be harmed by the delivery of Dude's separate assets to the Administrator of his probate estate. She merely quantifies that portion of the proposed supersedeas bond that would be pledged to secure Dude's separate property, *i.e.*, those assets listed in Table 1 of the Court's Opinion, *id.* at pp. 50–51.

a less stringent requirement of certainty of victory," and vice versa. *Id.* (quotation marks and citation omitted). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [the court's] discretion." *Nken v. Holder*, 556 U.S. 418, 433–34 (2009).

1. Dude's Separate Assets

As to the first category of assets, the Judgment ordered Shirley "to deliver the assets in Table 1 of the Order to the Administrator of the Estate of H.C. 'Dude' Crain, Jr." (Doc. 204). Shirley has not offered any explanation as to how or why she would be harmed by this aspect of the Judgment. Nor is the Court aware of any potential harm. As Shirley has correctly recognized, Dude's separate property must pass through probate. This is true regardless of whether Dude breached the PSA. In other words, if Shirley fully prevails on appeal, Dude's separate property must still pass through probate.

In her summary judgment motion, Shirley took the position that, as a matter of law, Dude's 2012 will did not violate the PSA. And since Shirley did not probate the will nor establish the trusts as directed by the will, even she agreed that Dude's separate property must be admitted to probate:

> Property that Dude owned at his death comprises his estate. Property that he had given away, put into trust, or owned jointly with his spouse at the time of his death is not in his estate. . . . It appears that on his death Dude separately owned stock in two companies: 100%

> of Premier Foam, Inc., and 100% of Dude, Inc. This property should be probated by the Executor, Ray Fulmer, in Sebastian County and conveyed into the Marital Deduction Trust per the terms of the 2012 Will.

(Doc. 90, pp. 26–27).

Shirley is unlikely to prevail on appeal because, as a threshold matter, Dude's 2012 will clearly did not comply with his obligations under the PSA. But even if Shirley *does* prevail, Dude's separate assets will necessarily pass through probate anyway—just as Shirley contemplated at summary judgment. Thus, Shirley can demonstrate no harm arising from the Court's order that she presently deliver those assets to Mr. Fulmer. The other stay factors follow suit for the same reasons and are therefore resolved against Shirley.

To be very clear, the Court's task here was limited to the adjudication of the breach of contract claim against Dude's estate and the imposition of a corresponding judgment consistent with the resulting remedy—in this instance, specific performance and a constructive trust. However, as this Court has acknowledged, and as Shirley has taken great pains to argue, the state probate court has sole jurisdiction to administer Dude's estate, which includes the authority to take possession, liquidate, divide, and/or retitle Dude's separate property, as well as the responsibility to oversee the payment of estate debts, expenses, and other legal obligations. **Accordingly, by no later than Friday, April 8, 2022, Shirley must deliver Dude's separate assets (Doc. 203, Table 1,**

pp. 50–51), to Ray Fulmer, in his capacity as the Administrator of Dude's estate, for further disposition.[8] To the extent grounds exist to question how or when these assets, or fractional interests within assets, should be administered in probate, the parties must seek relief from the state probate court.

2. Dude's Jointly Held Property

As for the second category of assets that are not subject to probate, (Doc. 203, Tables 2–5, pp. 52–59), the Court will now consider whether to stay the execution of the Judgment pending the outcome of the appeal.

a. Likelihood of Success on the Merits

Shirley contends that a stay pending appeal is appropriate because the appeal will raise serious and close legal questions, and she is likely to prevail. The

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[8] Shirley argues the Court lacks authority to impose a constructive trust over the personal property and household effects Dude owned at the time of his death because such property was not adequately identified by Plaintiffs. *See* Doc. 242, p. 25. The parties agreed prior to trial that the Court's task in this case was to determine Plaintiffs' equitable interest in Dude's separate and jointly held property. The parties also stipulated prior to trial that Dude owned certain, unspecified "personal property and household effects" during his lifetime, and that such property was in Shirley's custody and control. *See* Doc. 165, p. 9, ¶ 22(b). The parties further agreed that Dude's personal property and household effects would be inventoried by the Administrator in the normal course of probate proceedings after the Court determined Plaintiffs' equitable share. Shirley cannot swap horses post judgment; she must live with the position she took at time the factual issues were tried and submitted to the bench.

Court disagrees. The issues in this breach of contract case were factually complex but legally straightforward, and the Court finds there can be no reasonable dispute that Dude breached the contract. As for the remedy, a constructive trust was the only possible way to achieve specific performance of the contract's provisions, given the unique factual circumstances.

After a bench trial, the Court's factual and equitable findings are entitled to considerable deference. *See Hayes v. Metro. Prop. & Cas. Ins. Co.*, 908 F.3d 370, 374 (8th Cir. 2018) ("We review the district court's findings of fact in the bench trial for clear error and its legal conclusions de novo, overturning the factual findings only if they are not supported by substantial evidence, based upon an erroneous view of the law, or we are left with the definite and firm conviction that an error has been made."); *Kuehl v. Sellner*, 887 F.3d 845, 854 (8th Cir. 2018) ("We review the district court's grant of equitable relief for abuse of discretion . . . ."). Therefore, the first factor does not favor a stay.

b. Balancing the Equities

Shirley argues it will be nearly impossible to undo the complex monetary transactions ordered in the Judgment if the Court of Appeals reverses—and she is right. There is a strong likelihood Shirley will suffer irreparable harm if the Eighth Circuit reverses after she sells the real property included in the Judgment (including her primary residence and vacation home) and transfers the publicly traded securities to Plaintiffs. The Eighth Circuit instructs that "economic loss does not, in and of itself, constitute irreparable

harm," but "[t]he threat of *unrecoverable* economic loss, however, does qualify as irreparable harm." *Iowa Util. Bd. v. F.C.C.*, 109 F.3d 418, 426 (8th Cir. 1996) (quotation marks and citation omitted and emphasis added).

Given the vast number of documents in the record and the financial complexity of the assets identified in the Findings of Fact and Conclusions of Law, it is likely this appeal could take one or two years to resolve. If the Eighth Circuit disagrees with the Court's order in any respect, it will be next-to-impossible to turn back time and place the parties in the positions they are in now, particularly with respect to the real estate and publicly traded securities.

On the flip-side, a stay will not substantially injure Plaintiffs, provided that the status quo is maintained. This can be accomplished by requiring Shirley to post a supersedeas bond, with special conditions, in an amount equal to the cash, proceeds, dividends, and Plaintiffs' interest in the real estate and closely-held companies, that the Court impressed with the constructive trust, plus post-judgment interest. Although Plaintiffs would prefer that a stay not be granted, the parties agree with the component parts and line-item values to be bonded. Plaintiffs remaining concerns can be substantially ameliorated by the special conditions noted below.

To the extent the public's interest lies in the having the assets at issue distributed to the rightful owner or owners, a stay is favored. Moreover, if the Court's decision is reversed in any respect, the daunting task of identifying, tracing, and valuing the assets after they

have been disbursed to the four Plaintiffs' separate accounts would certainly tax this Court's finite judicial resources.

At bottom, the Court agrees with Shirley's identification and valuation of the constructive trust assets and proceeds that are most appropriately bonded pending appeal.[9] The Court also agrees with Shirley's proposal to "freeze" the account holding the constructive trust portion of the publicly traded securities. The Court will therefore approve a Supersedeas Bond in the total sum of $18,800,000.00, inclusive of post-judgment interest at a rate of 0.48% per year for a two-year period. *See* 28 U.S.C.A. § 1961(b). **By no later than the close of business on Wednesday, April 6, 2022, Shirley is directed to submit a proposed *form* of Supersedeas Bond in the sum of $18,800,000.00, including the identity of the proposed corporate surety.**

Additionally, the Court will require that Shirley evidence her agreement to comply with certain special conditions while the appeal is pending. With regard to

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[9] In her reply brief (Doc. 223) and supplement thereto (Doc. 226), Shirley identifies and values the jointly held assets and proceeds that are proposed to be bonded on appeal. At Plaintiffs' request, Shirley has acknowledged and accounts for certain valuation errors. *See* Doc. 223, p. 19. The parties are therefore in agreement that the principal value of the assets and proceeds "Held for Plaintiffs" in the constructive trust totals $18,620,408.76. (Doc. 226, p. 1). The parties also agree that $178,755.92 is an appropriate estimate of post-judgment interest to be secured by the bond. The total value of assets, proceeds, and interest to be bonded is $18,799,164.68, which the Court rounds to the even sum of $18,800,000.00.

real and personal property, Shirley must agree in writing, either within the form of the Supersedeas Bond or as a separate addendum, to the following conditions:

1. To not encumber the real property;
2. If requested, to provide Ray Fulmer, in his capacity as the Administrator of Dude's probate estate, and/or his designated representatives, with reasonable access to inspect and inventory the personal property and household effects impressed by the constructive trust for Plaintiffs' benefit;
3. To provide Plaintiffs (and/or a designated representative(s)) unrestricted access to inspect the Ranch and the Warehouse[10] on a semi-annual basis;
4. Provide Plaintiffs a quarterly accounting of the income produced by the Ranch and the Warehouse, to include a report of all gross income received and expenses paid, with lease and other supporting documentation upon request; and
5. Place the Plaintiffs' share of net real estate income into a separate escrow account.[11]

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[10] The Ranch refers to the leased residence at 3655 Beach Way in Van Buren, and the Warehouse refers to the commercial property on State Line Road in Fort Smith.

[11] A constructive trust was imposed for Plaintiffs' benefit on a collective 25% interest in the Ranch and a collective 50% interest

As for the publicly traded securities subject to the constructive trust,[12] the Court agrees with Shirley that the most conservative way to preserve these assets on appeal is to maintain them in their current management account. Shirley represents that she will transfer out of the account only those positions that are not subject to the constructive trust and leave behind all positions subject to the trust. She further represents that the account will "not be charged any commissions or management fees while frozen." (Doc. 223, p. 15) (emphasis in original). Shirley must restate and agree to abide by these representations within the form of the Supersedeas Bond or in a separate addendum. Additionally, Shirley must represent and personally guarantee that, if any commissions or management fees are charged on the frozen account during the pendency of the appeal, Shirley will be solely responsible for paying them. Finally, Shirley must timely provide (or direct that the account manager provides) Plaintiffs (or their designated representative) a copy of each monthly statement on the frozen account during the pendency of the appeal.

Once the form of the Bond is approved by the Court, Shirley will have ten (10) calendar days to file the fully executed version, at which point the Court will enter a

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in the Warehouse. (Doc. 203, Table 2, pp. 52–53). Net income in these same percentages must be deposited into a separate escrow account and held for Plaintiffs' benefit pending appeal.

[12] The specific securities and corresponding quantity of shares impressed by the constructive trust are identified in the Court's Findings of Fact and Conclusions of Law. (Doc. 203, Table 5, pp. 56–58).

formal stay of execution. Until then, the Court's interim stay remains in effect (Doc. 229).

III. CONCLUSION

IT IS ORDERED that Shirley's Motion to Alter Judgment (Docs. 231 & 242) is **DENIED**.

IT IS FURTHER ORDERED that Shirley's Motion to Stay Judgment Pending Post-Judgment Motion and Appeal (Doc. 218) is **GRANTED IN PART AND DENIED IN PART** as follows:

(1) The Motion is **DENIED** as to the separate assets subject to probate. By no later than Friday, April 8, 2022, Shirley must deliver Dude's separate assets (Doc. 203, Table 1, pp. 50–51), to Ray Fulmer, in his capacity as the Administrator of Dude's estate, for further disposition. To the extent grounds exist to question how or when these assets, or fractional interests within assets, should be administered in probate, the parties must seek relief from the state probate court.

(2) The Motion is **GRANTED** as to the constructive trust portion of Dude's jointly held assets that are not subject to probate. *See* Doc. 203, pp. 52–59. By no later than the close of business on Wednesday, April 6, 2022, Shirley is directed to submit a proposed *form* of Supersedeas Bond in the sum of $18,800,000.00, including the identity of the proposed corporate surety. She must also agree in writing, either within the form of the Supersedeas Bond or as a separate addendum, to the conditions set forth above with respect to the real property and publicly traded securities subject to the constructive trust. Upon the filing of the court-

approved and fully executed supersedeas bond, the Court will order that the execution of the Judgment be stayed as to these assets while the matter is on appeal with the Eighth Circuit.

IT IS SO ORDERED on this 31st day of March, 2022.

/s/ Timothy L. Brooks
TIMOTHY L. BROOKS
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

CASE NO. 2:20-CV-2038

[Filed January 18, 2022]

LISA CRAIN; CATHEE CRAIN; MARILLYN CRAIN BRODY; and KRISTAN SNELL PLAINTIFFS	)
V.	)
SHIRLEY CRAIN and RAY FULMER, as Representative of the Estate of H.C. "Dude" Crain, Jr., Deceased DEFENDANTS	)

AMENDED[1] MEMORANDUM OPINION AND ORDER

[*Table of Contents Omitted in Printing of this Appendix.*]

[1] The Court's Memorandum Opinion and Order (Doc. 201) directed the parties to report any inadvertent calculation or typographical errors they identified. The parties complied with the Court's directive and submitted suggested changes. *See* Docs. 202, 202-1. This Amended Memorandum Opinion and Order incorporates all revisions the Court deemed appropriate.

I. INTRODUCTION

Following the Court's May 24th ruling on Summary Judgment (Doc. 147), this matter came on for a bench trial from July 19, 2021, to July 21, 2021. The purpose of the trial was to identify and value the assets that H.C. "Dude" Crain owned and controlled just before his death on April 15, 2017.

Prior to trial, the parties agreed to submit opening briefs in lieu of opening statements. Several of Plaintiffs' witnesses also appeared on Defendants' witness list; so, for judicial efficiency and to avoid inconveniencing these witnesses by calling them to the stand twice, the Court ordered that all witnesses take the stand only one time and submit to questioning by all parties for all purposes.

Plaintiffs then presented their case-in-chief. They rested on the third day of trial, and Defendants presented an oral motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(a), which the Court denied from the bench. At that point, Defendants began their case-in-chief. They called only one witness, as the rest of their witnesses had already taken the stand during Plaintiffs' case-in-chief. After Defendants rested, they renewed their motion for judgment as a matter of law, which was once again denied. The parties then presented closing arguments, and afterward, the Court identified specific legal issues that required further briefing. The parties were directed to submit post-trial briefs on these selected topics within two weeks of the last day trial. All parties submitted their post-trial briefs on time, and the Court reviewed those briefs, the transcript of the trial, and

the voluminous exhibits that were introduced in evidence. Below is a brief description of the background of the case followed by the Court's findings of fact, conclusions of law, and rulings.

II. FACTUAL BACKGROUND[2]

Dude was eighty-seven years old when he passed away in 2017, leaving behind his second wife, separate Defendant Shirley Crain, and four adult daughters from his first marriage, Plaintiffs Lisa Crain, Cathee Crain, Marillyn ("Mimi") Crain Brody, and Kristan Snell. Dude married the Plaintiffs' mother, Marillyn, on May 1, 1954. Around 1960, Dude, Marillyn, and Dude's parents started Crain Sales Company. Initially, Marillyn worked full time for Crain Sales Company as the office manager. Among other things, Marillyn set up the office, answered the phones, accepted orders, checked the freight cars, managed the invoicing, hand crafted patterns for foam cushions, and handled accounts-payable. (Doc. 124, pp. 1–2). Around 1963, Crain Sales Company was incorporated as Crain Industries, Inc. Crain Industries grew to be one of the largest companies in Arkansas, manufacturing polyurethane foam and producing foam and polyester fiber products. (Doc. 165, p. 2).

Dude and Marillyn's marriage did not last. In 1984, he began dating the woman who would become his second wife, separate Defendant Shirley Crain. *Id.* He filed for divorce from Marillyn on September 30, 1988,

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[2] The factual background in this Opinion is merely a summary; a more fulsome description of undisputed facts appears in the Court's summary judgment order (Doc. 147, pp. 1–9).

after thirty-four years of marriage. *Id.* On June 22, 1989, the divorce was finalized, and Dude and Marillyn entered into a property settlement agreement ("PSA") (Doc. 38-2). According to the PSA, Marillyn did not receive any award of stock in Crain Industries. *See id.* The parties to the instant case agree that at or around the time of Dude and Marillyn's divorce, Crain Industries was a multi-million-dollar company. *Arkansas Business Journal* reported that in 1990—the year after the divorce—Crain Industries's annual revenues totaled $154 million. (Doc. 124, p. 6).

The PSA specified how Dude and Marillyn's real and personal property would be divided upon their divorce and memorialized their agreement to engage in estate planning. They made mutual promises to "maintain" wills that would leave at least half of their respective estates to their daughters. PSA Paragraph 3, the will provision, states:

> In further consideration of the covenants and agreements contained herein, husband and wife agree to maintain in full force and affect [sic] a valid Last Will and Testament whereby each will leave at least one-half of their estate to the four daughters of this marriage, Lisa . . .; Cathee . . .; Marillyn . . .; and Kristan . . ., per stirpes.

(Doc. 38-2, p. 6). The Chancery Court of Logan County, Arkansas, issued a written order stating that it had "examined the Property Settlement Agreement between the parties" and found "that said agreement is contractual and nonmodifiable." *Id.* at p. 2, ¶ 5. As soon as the PSA was finalized in June of 1989, Dude was free to marry Shirley, and he did so in November of

that same year. Dude and Shirley remained married for the next twenty-seven years, until Dude's death in 2017.

One of the Plaintiffs, Mimi, testified at trial that when her parents were going through their divorce proceedings in 1988, her mother told her about the PSA. (Doc. 191, pp. 163–64). Consequently, Mimi was aware of the contents of the PSA even before it was formally approved by the Chancery Court in 1989. *Id.* at p. 179. She also testified that Dude, unlike her mother, "never mentioned the property settlement agreement" to her. *Id.* at pp. 214–15. Shirley also testified that Dude never mentioned the PSA during their marriage, and she claims to have had no idea that it existed until Plaintiffs filed the instant lawsuit—almost three years after Dude's death. (Doc. 190, pp. 191–92).

Dude did engage in estate planning, though not for several years after signing the PSA. The first will he executed after his divorce from Marillyn was signed in 1993. That will left nothing to his daughters and everything to Shirley. *See* Doc. 104-1. Nearly two decades later, in 2012, Dude hired an attorney to draw up a new will. At the bench trial of this matter, Shirley testified that she was present during every meeting between Dude and the estate-planning lawyer. She claims the PSA was never mentioned during these meetings.

According to Dude's 2012 will (Doc. 38-3, pp. 5–28), Shirley was to serve as the executor of his estate upon his death. She was to supervise the creation of two trusts that would hold Dude's separate assets: the

Bypass Trust and the Marital Deduction Trust. The Bypass Trust was to benefit Dude's daughters and Shirley's son, Brian Pope, and would be funded with any assets available to pass through probate, free of estate taxes. *Id.* at § 2.2.A(a). During trial, the parties agreed that when Dude died, he had exhausted his lifetime gift and estate tax credit, so no assets existed that could have passed into the Bypass Trust tax-free. The Marital Deduction Trust was to hold the remainder of Dude's assets, and Shirley was to serve as sole trustee and sole direct beneficiary of that trust. Plaintiffs and Brian were named remainder beneficiaries of the Marital Deduction Trust, which meant they would inherit any assets that remained in the trust after Shirley died. *See id.* at §§ 2.3.B & 2.3.E. Dude's 2012 will specified that Shirley would have full discretion to pay herself "annually or more frequently all of the net income" of the Marital Deduction Trust as well as "so much or all of the principal" that she desired during her lifetime. *Id.* at §§ 2.3.C. & 2.3.D. In other words, she was under no legal obligation to leave anything in the Marital Deduction Trust for Plaintiffs to inherit upon her death.[3]

In September of 2014, when Dude was eighty-four years old, he suffered a serious fall and hit his head.

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[3] On May 21, 2012, approximately a month after Dude signed the 2012 will, he executed a codicil to that will. *See* Doc. 38-3, pp. 29–32. The codicil's only function was to further limit the Plaintiffs' (and Brian's) ability to inherit under the will. Before the codicil was executed, the will had specified that the Plaintiffs and Mr. Pope would inherit under both trusts per stirpes, but the codicil modified §§ 2.3E and 2.4 of the will to eliminate per stirpes inheritance. *See* Doc. 38-3, pp. 29–30.

Shirley testified at trial that he required constant medical care after this accident and was largely incapacitated until his death. Shirley indisputably took a more active role in managing the couple's investments and businesses from the date of Dude's accident until his passing in April of 2017. For unknown reasons, Shirley did not open a probate estate at that time, nor did she submit the 2012 will—or any will—to probate; she did not direct the creation of the two trusts specified in the 2012 will; and she did not retitle any assets in the name of either trust identified in the will. Instead, she retitled all joint assets in her own name and took sole possession of Dude's separate assets.

III. PROCEDURAL BACKGROUND

On March 19, 2020, just prior to the three-year anniversary of Dude's death, Plaintiffs filed a petition to open a probate proceeding in the Circuit Court of Sebastian County, Arkansas, knowing that their father had entered into a contract with their mother promising to leave them at least one-half of his estate. The probate court appointed Separate Defendant Ray Fulmer to serve as the Administrator of Dude's estate. Shirley initially represented to the probate court that Dude's operative will was the one he wrote in 1993, which left his daughters nothing. She later disclosed the 2012 will.[4]

On March 27, 2020, Plaintiffs filed the instant lawsuit, which asked this Court to find that Dude

[4] It is the Court's understanding that the probate proceedings have since been stayed pending entry of judgment in this case.

breached his obligations under the PSA. The basis for federal jurisdiction was complete diversity of citizenship: Plaintiffs hale from Texas; Defendants are citizens of Arkansas; and the amount in controversy is well over the $75,000 jurisdictional minimum. Shirley was named a defendant because she took possession of all of Dude's assets following his death in 2017, and from that point onward, she either maintained, distributed, or sold those assets. Shirley's son Brian was also named a defendant, as Plaintiffs alleged that Shirley gave Brian some of the assets of Dude's estate that were subject to Plaintiffs' legal claim. Shirley and Brian took the position during the lawsuit that Dude fully satisfied his promises to Plaintiffs under the PSA through gifts made during his lifetime and bequests he made in his 2012 will.

The parties agreed fairly early on in the litigation that this Court would decide Plaintiffs' breach-of-contract claim on cross-motions for summary judgment. Those motions (Docs. 89 & 101) were submitted in February of 2021, and after extensive briefing and an in-person hearing, the Court concluded in an Order issued on May 24, 2021, that Dude had breached the will provision of the PSA, that the 2012 will—though legally enforceable—did not satisfy his contractual obligations, and that specific performance was the appropriate remedy for the breach. *See* Doc. 147. How to achieve specific performance, however, was a somewhat thorny issue, given the passage of time between Dude's death and the Court's decision. Shirley and Brian filed a joint motion for clarification, and the Court responded in an Order filed on July 8, 2021, that explained:

[S]pecific performance of the contract at issue here—where the breaching party passed away, and the assets that were the subject matter of the contract were devised by will to other heirs or distributed to other parties by operation of law several years ago—requires the use of a constructive trust to eventually reunite legal ownership with equitable and/or beneficial ownership. As the Arkansas Supreme Court explained, "A constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." *Cox v. Miller*, 210 S.W.3d 842, 848 (Ark. 2005). It is not necessary to prove fraud to obtain a constructive trust. *See id.* Rather, the "wrongful disposition of another's property" will create a "duty to convey the property" by means of constructive trust "without regard to the intention of the person who transferred the property." *Id.* at 849.

. . . .

In the instant matter, Dude's daughters—the Plaintiffs—were supposed to inherit half of his estate pursuant to a contract Dude entered into before his marriage to Shirley. Dude did not live up to his obligations under the contract. Although Shirley is innocent in all of this—after all, no one is alleging that she defrauded the Plaintiffs—she will nevertheless be unjustly enriched if she is permitted to retain 100% of the assets of Dude's estate. A constructive trust "on half the property Dude owned and controlled up

> to the moment of his death, (as well as any post-death interest, earnings, or proceeds)" is the appropriate equitable remedy for Dude's breach of contract. (Doc. 147, p. 17). The identity and value of specific assets meeting that definition are disputed and remain for trial.

(Doc. 167, pp. 4 & 6).

Before the bench trial, the parties stipulated to the identity and value of nearly all the assets Dude owned and controlled at his death, either individually or jointly with Shirley. *See* Doc. 165. They also stipulated as to which of these assets Shirley still possessed as of the date of trial. *Id.* Finally, they stipulated as to whether and when Shirley sold certain assets and the sale price of those assets. *Id.* After three days of testimony, the parties[5] were ordered to submit post-trial briefs to discuss their respective theories as to how the Court should account for the assets in Dude's estate that Shirley no longer possessed. *See* Docs. 187–189.

In the discussion below, the Court will first identify and value the assets Dude owned separately at the time of his death. Second, the Court will identify and value the assets Dude owned jointly with Shirley at the

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[5] The only parties who participated in the trial were the four Plaintiffs, Shirley, and Ray Fulmer, the Administrator of Dude's estate. On the day before trial was to begin, Plaintiffs and Brian agreed to certain stipulations of fact in exchange for his release from the lawsuit. *See* Docs. 172 & 172-1. The Court granted Plaintiffs' motion and dismissed Brian from the case on the morning of the first day of trial. *See* Doc. 175.

time of his death. In itemizing the joint assets, the Court will also consider whether Shirley established at trial any equitable ownership interest in any asset. Third, the Court will consider whether Dude paid Plaintiffs any amount that could be considered an advance on their inheritance pursuant to the PSA. Once the assets, their locations, their values, and any credits or offsets are accounted for, the Court will detail how a constructive trust should be equitably impressed in order to remedy Dude's breach of the PSA.

IV. DISCUSSION

As noted at the outset of this Opinion, the trial of this matter was limited in scope. The Court previously determined as a matter of law that Dude breached the PSA. (Doc. 147, p. 16). At trial, the parties presented evidence and argument so that the Court could determine and effectuate the proper remedy for Dude's breach. Impressing a constructive trust over one half of the assets in Dude's estate was the appropriate remedy, but identifying and valuing those assets as of the date of Dude's death and then tracing their current location presented significant challenges. Below, the Court makes the following findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.[6] The Court's ruling will then

[6] To the extent that any of the Court's findings of fact constitute conclusions of law, or mixed findings of fact/conclusions of law, the Court adopts those conclusions as if they had been restated as conclusions of law. The opposite also applies.

be expressed by applying the conclusions of law to the Court's findings of fact.

A. Findings of Fact

1. Dude's Separate Assets

1. Dude died on April 15, 2017.

2. On the date of his death, Dude owned certain separate assets. Immediately after his death, Shirley took possession of Dude's separate assets and either held or disposed of them as she saw fit. Shirley's actions were contrary to the 2012 will—of which she was well aware.

3. Dude's probate estate was eventually opened in the Circuit Court of Sebastian County, Arkansas. This means that the separate assets Dude owned at the time of his death will now pass through probate.

a. RJ Account 827

4. On the date of his death, Dude separately owned a Raymond James IRA Account ending in 827 ("RJ Account 827"). (Doc. 165, p. 7).

5. RJ Account 827 was opened by Dude on January 13, 2005. Shirley was named the sole direct beneficiary of the account. *Id.* The Plaintiffs were named as contingent beneficiaries. (Plaintiffs' Ex. 69.6).

6. On the date of Dude's death, the value of RJ Account 827 was $722,766.37. The account held the following assets: (1) Raymond James Bank Deposit Program ($214,448.95); (2) Highland Floating Rate Opportunities Fund (Class A) (4,253 shares); and

(3) Oppenheimer Steelpath MLP Income Fund (Class A) (63,624 shares). (Doc. 165, p. 7). The two mutual funds automatically reinvested dividends to acquire more shares of the respective funds. (Doc. 192, p. 18).

7. In July 2017, Shirley transferred all of Dude's holdings in RJ Account 827 to an IRA account that she opened in May 2017 in her own name, which is referred to here as Raymond James IRA Account ending in 450. (Doc. 165, p. 7). Shirley added her son Brian as a beneficiary of this account. (Plaintiffs' Ex. 89.1).

8. One-half the value of the Raymond James Bank Deposit Program, calculated as of the date of Dude's death, is $107,224.47.

9. Shirley has in her possession at least $107,224.47 from the Raymond James Bank Deposit Program. These funds are located in her Raymond James IRA Account ending in 450 ("RJ Account 450"). (Doc. 165, p. 7).

10. The Highland Floating Rate Opportunities Fund (HRFAX) merged in 2017 into the Highland Income Fund (HFRO). As a result of this merger, Dude's 4,253 shares of this Fund were converted to 2,108 shares.

11. Shirley still holds all 2,108 of Dude's HFRO shares in RJ Account 450. (Doc. 165, p. 8). One-half of the total shares would be 1054 shares.

12. After Dude's death, his original 63,624 shares of Oppenheimer Steelpath MLP Income Fund (Class A) increased over time because of reinvested dividends. (Compare Plaintiffs' Exs. 61.6 with 63.5).

13. On February 26, 2020, Shirley sold all of Dude's original holdings in Oppenheimer Steelpath MLP Income Fund (Class A), which had increased by that point to 88,578 shares, for $369,364.97. (Plaintiffs' Ex. 67.7). On that same day, Shirley purchased 500 shares of Apple stock (AAPL) for $151,090.75, and the following day she purchased 100 shares of Alphabet Incorporated Class A stock (GOOGL) for $142,650.94. *Id*. RJ Account 450 continues to hold these shares of AAPL and GOOGL (Doc. 165, pp. 7–8), and thus Shirley's sale of Dude's Oppenheimer Steelpath MLP Income Fund (Class A) for $369,364.97 (half of which equals $184,682.48) can be traced to these stock holdings in RJ Account 450.

b. Dude, Inc.

14. According to Dude's tax returns, he owned 100% of Dude, Inc., during taxable year 2016, the year before he passed away. (Plaintiffs' Ex. 36.50).

15. Shirley testified at trial that she was "under the impression that [she and Dude] were both 100 percent owners" of the company, but she had no proof to substantiate this assertion. (Doc. 190, p. 23).

16. Dude's tax return from 2017 shows that his 100% interest in the company was divided, with him owning 28.8% and Shirley owning 71.2%, which the Court finds represents the percentage of days of the taxable year that Dude was alive. (Plaintiffs' Exs. 37.60 & 37.62).

17. Shirley was unable to testify as to the value of Dude, Inc., explaining that she had not done any

research and would have to "bone up on it." (Doc. 190, p. 27).

18. Shirley testified that she believed the tax returns might have been "wrong in several places," (Doc. 190, p. 23); however, she agreed she had approved of all tax returns before they were filed, as she was "the liaison" between Dude's companies and the tax preparer. *Id.* at p. 24.

19. Based on the tax returns and the testimony of Plaintiffs' expert witness, Ms. Cheryl Shuffield, the Court finds that the value of Dude, Inc., as of December 31, 2020, was $4,400,000.00. *See* Plaintiffs' Exs. 36 & 37; Doc. 191, p. 19; Court's Ex. 1, Dude, Inc. Fair Market Value Analysis.

c. Premier Foam, Inc.

20. Shirley testified that Dude owned 90% of Premier Foam, Inc., at the time of his death, and that she owned 10%.

21. But according to Dude's tax returns, he owned 100% of Premier Foam, Inc., during taxable year 2016, the year before he passed away. *See* Plaintiffs' Ex. 207.028.

22. Dude's tax return from 2017 shows that his 100% interest in the company was divided, with him owning 28.8% and Shirley owning 71.2%, which the Court finds represents the percentage of days of the taxable year that Dude was alive. (Plaintiffs' Ex. 208.19).

23. Shirley testified with respect to Premier Foam's tax returns that even though she was the "liaison" between the business and the tax preparer, the tax returns were inaccurate. She testified, "I made a mistake by not being more careful about the tax returns," and claimed that even though the tax returns showed she owned no shares of Premier Foam, Inc., at the time of Dude's death, she actually owned 100 shares, or 10% of the company. (Doc. 190, p. 31).

24. Shirley produced in discovery a stock ledger for Premier Foam, Inc. *See* Plaintiffs' Ex. 323.74. She testified that the stock ledger correctly listed the number of shares of Premier Foam, Inc., that were owned by each of the shareholders in 2007. *See* Doc. 190, pp. 36–37. Shirley was not listed as a shareholder at that time, and her husband was listed as owning 56% of shares of the company. *Id.*

25. Shirley produced in discovery the front (but not the back) of a stock certificate for Premier Foam, Inc., dated February 8, 2011. *See* Plaintiffs' Ex. 323.72. The stock certificate indicates that she is the holder of 100 shares of Premier Foam, Inc. However, the only signature on the certificate is that of the secretary of the company, whom Shirley testified was her husband, Dude. Shirley agreed that no other documents existed to prove her ownership of 100 shares of the company. *See* Doc. 190, p. 34.

26. Shirley also agreed that a man named Pratt Wallace was the president of Premier Foam, Inc., on February 8, 2011, the date that 100 shares of stock were allegedly transferred to her. *See* Doc. 190, p. 40.

Mr. Wallace did not sign the stock certificate. *See* Plaintiffs' Ex. 323.72.

27. Based on Shirley's testimony and the documentary evidence presented at trial, the Court finds that even if Shirley had validly received 100 shares of Premier Foam, Inc. stock on February 8, 2011, she did not own any stock in the company in 2016, the year before Dude's death.

28. Dude owned 100% of Premier Foam, Inc., at the time of his death.

29. Based on the tax returns and the testimony of Plaintiffs' witness, Ms. Shuffield, the Court finds that the value of Premier Foam, Inc., as of December 31, 2020, was $12,040,000.00. *See* Plaintiffs' Exs. 207 & 208; Doc. 191, p. 18; Court's Ex. 1, Premier Foam, Inc. Fair Market Value Analysis.

30. After Dude's death, Shirley received distributions from Premier Foam, Inc., to her BancorpSouth checking account ending in 6671. Those distributions total $3,240,000.00. *See* Plaintiffs' Exs. 208.19, 209.25, 210.029, 211–222; Doc. 190, pp. 44–53.

31. Shirley testified that Dude loaned Premier Foam, Inc. $10 million at some point prior to his death. She maintained that at around the time of Dude's death, this loan amount was down to approximately $6 million. *See* Doc. 190, p. 52. She claimed that the distributions she received from Premier Foam, Inc., after Dude's death were intended to pay the loan. The Court finds that, other than Shirley's testimony at trial, there is no evidence of a loan made by Dude to Premier Foam, Inc. The Court further finds that

Shirley's testimony regarding the existence of a loan to Premier Foam, Inc., is not credible, and that distributions she received from the company after Dude's death were simply cash payments.

32. Half of the distributions Shirley received from Premier Foam, Inc., after Dude's death total $1,620,000.00.

d. Dude's Separate Personal Property and Household Effects

33. The parties represented to the Court that Dude owned certain personal property and household effects at the time of his death, and that these items are currently in Shirley's possession. (Doc. 165, p. 9). However, the parties did not offer the Court any details about this separate property, nor did they estimate any values. The Administrator of Dude's estate has the responsibility to identify and inventory the items in this category.

2. Shirley's Separate Assets (Purchased with Marital Funds)

34. Certain items of property were identified by the parties as having been titled in Shirley's separate name before Dude's death even though they were purchased during the marriage with marital funds.

35. Shirley gave alternate reasons during her testimony as to why these separate properties were titled in her name. At one point, she suggested they were gifts to her from Dude. *See* Doc. 190, p. 114. At another point, she stated that these properties were

titled in her name simply because doing so was "expedient." *Id.* at p. 115.

36. Real property located at 509 Doubletree Trail, Flower Mount, Texas, was titled in Shirley's separate name during her marriage to Dude but was purchased with marital funds. One of Shirley's sisters lives in this property rent-free. (Doc. 190, pp. 94–95).

37. Real property located at 4806 West Trail Dust Street, Fayetteville, Arkansas, was titled in Shirley's separate name during her marriage to Dude but was purchased with marital funds. Another sister of Shirley's lives in this property rent-free. (Doc. 190, pp. 95–96).

38. Real property located at 641 64th Avenue, Marathon, Florida, was titled in Shirley's separate name during her marriage to Dude but was purchased with marital funds. Shirley sold that home in 2020. (Doc. 190, p. 96).

39. A Prudential Annuity (Contract Number: E0483716) was purchased in Shirley's separate name using marital funds. Testimony at trial indicated that the value of this annuity is $5,500,000.00. (Doc. 165, p. 9; Doc. 190, p. 98).

40. Assets titled in Shirley's sole name prior to Dude's death were likely gifts, and, in any event, constitute assets that Dude did not own and control at the time of his death. Plaintiffs affirmatively disclaim any interest in the properties that are or were titled in Shirley's separate name or in the proceeds from the sale of these properties.

3. Assets Dude Owned Jointly with Shirley at His Death

41. On the date of his death, Dude owned certain assets jointly with Shirley, either in tenancies by the entirety or in joint tenancies with right of survivorship.

42. Those jointly held assets passed directly to Shirley by operation of law upon Dude's death.

43. The purchase monies used to buy the jointly held assets originated from Dude, not Shirley. Testimony at trial confirmed that at the time of her marriage to Dude, Shirley's separate property included, at most, one or two vehicles and $40,000.00 in cash, which she had "earmarked" to pay for her son's college. (Doc. 190, pp. 230–31). Dude started Crain Industries, a multi-million-dollar business, decades prior to his marriage to Shirley. She testified that during her marriage to Dude, she helped with Dude's businesses in various ways, and she did not earn a separate income from any job that was unrelated to these businesses. There was some testimony at trial that Shirley engaged in professional sports fishing during the marriage, but she stated that this was a hobby she did mostly "for fun" and not for profit. *Id.* at p. 234.

44. Dude sold Crain Industries in 1995. Just before the sale, Dude owned 55.72% of the outstanding stock, while his daughters, the Plaintiffs, owned the rest—44.28% of the business. According to the testimony at trial, Dude had to acquire his daughters' stock in Crain Industries before he could sell the company. (Doc. 191, p. 164). Mimi testified that her father approached her and her sisters in the early

1990s about buying their stock. *Id.* At the time, Dude was trustee of his daughters' shares. *Id.* All four daughters agreed to sell their interest in Crain Industries to their father, and he purchased their shares in full before selling the company to the end purchaser. At trial, Mimi produced her written consent to the sale of her shares; that document stated that Dude promised to pay Mimi a total of $3,000,000.00 for her interest in Crain Industries. (Court's Ex. 4). Mimi testified that Dude paid her a total of $1,000,000.00 in installments, but he stopped making payments after 1993 and still owed her $2,000,000.00, plus interest, at the time of his death. *Id.* at pp. 168–69. She produced her tax returns to confirm that Dude made only two installment payments of $500,000.00 each. *See* Court's Ex. 5. Cathee testified that Dude also promised to pay her $3,000,000.00 in installments, plus interest, for her shares in Crain Industries, and that he made the same agreement with her other two sisters, Lisa and Kristan. (Doc. 191, p. 216). Cathee further testified that Dude died still owing each sister the same amount ($2,000,000.00). *Id.*[7]

45. The purchaser of Crain Industries paid $130,000,000.00 for the business. (Shirley's Ex. 76). Once taxes and liabilities were subtracted from the purchase price, the net cash that was realized from the sale of Crain Industries was $83,926.986.55. *Id.* This money funded most of the purchases and investments that Dude and Shirley made during their marriage.

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[7] Shirley claims that Dude repaid the Plaintiffs in full for the purchase of their stock in Crain Industries. *See* Doc. 191, p. 136. The Court finds Shirley's contention neither credible nor accurate.

a. Real Property

46. On the date of Dude's death, Dude and Shirley owned the following real property jointly as husband and wife:

- 10101 Dallas Street, Fort Smith, Arkansas (the marital home);
- 3655 Beach Way, Van Buren, Arkansas (the ranch);
- 201 West Seaview Drive, Marathon, Florida (the Florida vacation home);
- 6201 State Line Road, Fort Smith, Arkansas (the warehouse);
- 4300 Phoenix Avenue, Fort Smith, Arkansas (Kitties and Kanines); and
- 14805–07 Dutchman Drive, Rogers, Arkansas (the lake house).

(Doc. 165, pp. 8–9).

47. All of these properties passed directly to Shirley by operation of law at Dude's death.

The Marital Home

48. The assessed value of 10101 Dallas Street is $7,070,250.00. (Doc. 165, p. 8).

49. According to Shirley's testimony, 10101 Dallas Street was built in 2008, and she and Dude lived there together as husband and wife until he passed away. Shirley worked with an architect to design the house

that was situated on that property. The design was suited to Shirley's taste, and she selected all finishes and furnishings. She also oversaw the years-long construction of the home, and she still lives there. (Doc. 190, pp. 126–27).

The Ranch

50. 3655 Beach Way was acquired in 1992 and was the couple's primary home just after they were married. (Doc. 165, p. 8). According to Shirley's testimony, she raised horses and cattle at 3655 Beach Way, which she referred to as a "ranch." (Doc. 190, p. 126).

51. The appraised value of 3655 Beach Way is $2,497,590.00. (Doc. 165, p. 8).

52. After Dude's death, Shirley collected rent for 35 months from renters who were living at 3655 Beach Way. The amounts of these rent payments varied, but Shirley received these payments consistently from May 1, 2017, through April of 2020 in the total amount of $50,872.24. *See* Plaintiffs' Ex. 334. The rent payments were deposited to Shirley's BancorpSouth 6671 checking account. *Id.* Shirley still owns this property.

The Florida Vacation Home

53. 201 West Seaview Drive was acquired in 1994 as a vacation home. (Doc. 165, p. 8). Shirley testified that when the property was purchased, it was "in terrible condition," and she oversaw all property renovations. (Doc. 190, pp. 130–31). She also decorated it to her taste. *Id.* Following one or more hurricanes, the house was renovated for a second time, beginning in 2016.

The construction work was only recently completed, and Shirley still possesses this property. *See id.* at p. 131.

54. The appraised value of 201 West Seaview Drive is $4,900,000.00. (Doc. 165, p. 9).

The Warehouse

55. 6201 State Line Road is a commercial warehouse that is still in Shirley's possession.

56. Licensed property appraiser Brad Tharpe testified at trial that the habitable square footage of 6201 State Line Road was 262,028 feet. (Doc. 191, p. 71). Comparing this property to similar properties in the geographic area, Mr. Tharpe determined that the appropriate price per square foot was $18.00. Using this figure, Mr. Tharpe valued the property using the market comparison approach and found that the appraised value was $4,720,000.00. *Id.* at pp. 77–78. Mr. Tharpe alternatively valued the property using the income capitalization method, which resulted in a valuation of $4,680,000.00. *Id.* at p. 80. Reconciling these two figures, Mr. Tharpe arrived at a final estimate of the value of 6201 State Line Road of $4,700,000.00. *Id.* at p. 81.

57. Licensed appraiser Donald Burris also testified at trial. He appraised the property at 6201 State Line Road and believed the gross rentable area was 268,068 square feet, which is about 6,000 square feet more than Mr. Tharpe's measurement. (Doc. 192, p. 138). Mr. Burris used both the market comparison approach and the income valuation approach to determine the appraised value of the property. *Id.* at p. 101. After

comparing 6201 State Line Road to similar properties in the area, Mr. Burris decided that the appropriate price per square foot was $14.50, which resulted in a market valuation of $3,910,000.00. *Id.* at p. 109. Using the income capitalization method—and assuming a rental rate comparable with the rates of similar properties in the area—Mr. Burris determined that the value of the property was $3,930,000.00. *Id.* at p. 112. Reconciling these two figures, Mr. Burris arrived at a final estimated value for the property of $3,925,000.00. *Id.*

58. A tenant has occupied 6201 State Line Road continuously since before Dude died. (Doc. 190, p. 90). After Dude died, the tenant paid rent directly to Shirley. At the time of trial, Shirley had collected fifty months of rent from tenant MP Warehouse, beginning in May of 2017 and continuing through July of 2021. Each month's rent was $38,224.00; after fifty months, the total rent collected by Shirley for this property was $1,911,200.00. (Doc. 190, pp. 92–93; Plaintiffs' Exs. 334.003–334.262).

59. Mr. Burris's valuation of 6201 State Line Road was likely too low. He testified at trial that when he inspected the property, he observed that a tenant was occupying it. Even though Mr. Burris was Shirley's retained expert, she did not inform him how much she was charging per month in rent. When Mr. Burris performed his initial market evaluation of the property, he assumed that $1.65 per square foot was a reasonable rent amount; however, that amount was not calculated based on the actual rent payments Shirley had been collecting. The Court questioned Mr. Burris

during trial, and it appeared that a more reasonable assumption for rent per-square-foot, based on the actual rent Shirley collected, was $1.75 per square foot. Using that new figure, Mr. Burris calculated that the value of 6201 State Line Road, using the market valuation method, was approximately $4,200,000.00. (Doc. 192, pp. 137–38). The Court adopts that valuation and finds that the reasonable fair market value of 6201 State Line Road is $4,200,000.00.

Kitties and Kanines

60. 4300 Phoenix Avenue in Fort Smith, Arkansas, was a large building that was acquired on or around August 8, 2011, and was jointly owned by Dude and Shirley at the time of Dude's death. (Doc. 165, p. 9). However, in December of 2017, Shirley donated the Phoenix Avenue property to a charity called Kitties and Kanines. *Id.* The Phoenix Avenue property was appraised for $525,000.00. As a result, Shirley received a tax credit of $236,250.00. *Id.*

61. Plaintiffs disclaim any right or interest in the Phoenix Avenue property, including its appraised value and any tax deduction Shirley received. (Doc. 192, p. 164).

Lake House

62. 14805–07 Dutchman Drive in Rogers, Arkansas, was a property consisting of duplexes acquired by Dude and Shirley on or around August 4, 2000. They were owned jointly by Dude and Shirley at the time of Dude's death. (Doc. 165, p. 9).

63. Shirley testified that she and Dude bought the duplexes on Dutchman Drive so they could "fish Beaver Lake" in Northwest Arkansas. (Doc. 190, p. 132). She also testified that she oversaw the renovation of this property at or around the time of purchase. *Id.*

64. On February 21, 2018, less than a year after Dude's death, Shirley sold 14805–07 Dutchman Drive for $350,000.00. (Doc. 190, p. 89).

65. As a result of the sale of the Dutchman Drive property, Shirley deposited $325,195.40 in net proceeds in her BancorpSouth account ending in 6671. (Plaintiffs' Ex. 334.213). One-half of the net proceeds is $162,597.00.

b. Cash Held in Joint Bank Accounts

66. As of the date of Dude's death, he and Shirley possessed joint checking accounts. These were held in the form of joint tenancies with right of survivorship. (Doc. 165, p. 8).

Account 6671

67. BancorpSouth Joint Checking Account ending in 6671 contained $149,133.94. Upon Dude's death, Shirley became the sole legal owner of that account. (Doc. 165, p. 8). As of the time of trial, the balance in that account was $231,369.18. (Plaintiffs' Ex. 330.1).

Account 2206

68. BancorpSouth Joint Checking Account ending in 2206 contained $122,883.37. Upon Dude's death, Shirley became the sole legal owner of that account.

(Doc. 165, p. 8). The account's balance as of the time of trial was $198,676.19. (Plaintiffs' Ex. 331.1).

Account 1312

69. BancorpSouth Joint Checking Account ending in 1312 contained $16,162.33. (Doc. 165, p. 8). Upon Dude's death, Shirley became the sole legal owner of that account. She closed this account in early 2020. *Id.* All funds were withdrawn in cash. (Plaintiffs' Ex. 31). The Court traces this cash to Shirley's primary checking account ending in 6671. Accounts 1312 and 6671 were maintained at the same bank at the same time, and Shirley used them in the same manner, namely, to pay bills and ordinary expenses and to deposit rental payments. *See* Restatement (Third) of Restitution § 59, cmt. f ("If the claimant can trace funds into the hands of a recipient who maintains multiple bank accounts," the court may, based on the facts before it, determine that "two or more accounts should be aggregated" for purposes of tracing funds into the accounts.).

c. Regional Jet Center

70. Regional Jet Center, Inc., is a company that Dude started in 2001. (Doc. 190, p. 142). The company is physically located at the Northwest Arkansas Regional Airport near Bentonville, Arkansas. Regional Jet Center leases the land on which it operates. *Id.* at p. 54. It is a fixed-base operation that sells jet fuel to the airlines that operate out of the airport. (Doc. 191, p. 50). It also offers aircraft maintenance and other services. Its facilities include a fixed wing hangar, a gym, a pilot's lounge and sleeping rooms, conference

rooms, and a reception area. It possesses the exclusive right to provide fuel and de-icing services to all planes using the airport. (Court's Ex. 1, Regional Jet Center, Inc. Fair Market Value Analysis, p. 9).

71. Shirley testified that Regional Jet Center's ground lease is set to expire in the next six or seven years. (Doc. 190, p. 54). Plaintiffs' expert, Ms. Shuffield, testified that she was provided information confirming that the lease would expire in 2031. *See* Doc. 191, pp. 15–16; Court's Ex. 1, Regional Jet Center, Inc. Fair Market Value Analysis, p. 5.

72. When Dude started Regional Jet Center, he decided that he and Shirley would jointly own one-sixth of the stock in the company, and their shares would be the only voting shares. The remaining five-sixths of the stock in the company were nonvoting shares, and they were divided equally among the four Plaintiffs and Brian. (Doc. 165, p. 10).

73. Dude and Shirley's one-sixth interest in Regional Jet Center is valued at $1,480,000.00. (Doc. 191, p. 17; Court's Ex. 1, Regional Jet Center, Inc. Fair Market Value Analysis).

74. Shirley testified that she "decorated and helped to design the building" where Regional Jet Center operates. (Doc. 190, p. 148). After Dude's fall in 2014, she took on an expanded role with more responsibilities. She testified that she worked with the CEO of the company on repairing and replacing equipment, buying new equipment, and repairing the building and the asphalt roadways. *Id.* at pp. 148–49. She also handled "any kind of labor disputes" within

the company. *Id.* at p. 149. She currently manages (or oversees the management of) most of the operations for the business and is paid a salary of $15,000.00 per year for her efforts, mainly so that she can "draw insurance." *Id.* at 75. Upon Dude's death, their one-sixth interest in the company became Shirley's by operation of law.

76. Since Dude's death in 2017, Shirley has received a total of $938,519.00 in stock distributions from Regional Jet Center. (Plaintiffs' Exs. 240.085, 241.060, 242.109). Those distributions are traced to Shirley's BancorpSouth checking account ending in 2206. (Plaintiffs' Exs. 334.264–334.285). The Plaintiffs have also received distributions since Dude's death (at least through 2019). (Plaintiffs' Exs. 240–42).

d. Airport Transportation Company

77. Airport Transportation Company was started by Dude in 2002, shortly after he started Regional Jet Center. Dude owned the company jointly with Shirley.

78. Airport Transportation Company is a licensed and bonded freight shipping and trucking company. It owns tractor trailers and tankers that transport airline fuel in Northwest Arkansas. It services Regional Jet Center and is responsible for delivering the airline fuel used by Regional Jet Center for planes that fly in and out of Northwest Arkansas Regional Airport in Bentonville, Arkansas. (Court's Ex. 1, Airport Transportation Company Fair Market Value Analysis).

79. Shirley testified that since Airport Transportation Company's inception, she has been very involved in the operations. She testified that she has

always been responsible for negotiating the contracts for purchasing fuel. She also stated, "I purchase, or make arrangements to purchase, the trucks, the hauling, the lease from the airport, the tanks." (Doc. 190, p. 157). She claims she did all of these tasks on behalf of the company both prior to Dude's accident in 2014 and after his accident, continuing to the present day. *Id.*

80. Plaintiffs' expert, Ms. Shuffield, valued Airport Transportation Company at $1,705,000.00. (Doc. 191, p. 17; Court's Ex. 1, Airport Transportation Company Fair Market Value Analysis). The Court finds this valuation to be accurate.

81. Upon Dude's death, his interest in the company became Shirley's by operation of law. Shirley has received distributions from Airport Transportation Company since Dude's death. (Doc. 190, pp. 63–64).

82. According to the tax returns for Airport Transportation Company for 2017, 2018, and 2019, *see* Plaintiffs' Exs. 21.19, 22.16, 23.15, Shirley's distributions after Dude's death totaled $1,372,000.00.

83. Plaintiffs were unable to trace exactly where all the distributions from Airport Transportation Company were deposited, but Shirley testified that she believed the distributions went to her BancorpSouth account ending in 6671. (Doc. 190, p. 64).

e. Loan to Brian Pope

84. Prior to Dude's death, Shirley made certain transfers to her son Brian, his trust, and/or companies affiliated with him, including but not limited to

Cognition, Inc., a California corporation; LIT POST, LLC, a California limited liability company; Cognition Corporation, a California corporation; and the ARC/K Project, a California non-profit corporation. (Doc. 172-1, p. 1).

85. These transfers totaled $9,100,000.00, and they originated from Dude and Shirley's joint accounts. (Doc. 172-1, p. 1).

86. These transfers were loans from Dude and Shirley to Brian. (Doc. 172-1, p. 1).

87. After Dude's death, Shirley made other transfers to Brian, his trust, and/or his affiliated businesses in the total amount of $6,000,000.00. At least $4,650,000.00 of these post-death transfers originated from Shirley's BancorpSouth account ending in 6671. Shirley does not assert that these post-death transfers were loans. (Doc. 172-1, p. 2).

f. Joint Raymond James Investment Account Ending in 975

88. At the time of Dude's death, he and Shirley held numerous assets in a joint Raymond James account ending in 975 ("RJ Account 975"). This account held stocks, mutual funds, bonds, and cash. Dude and Shirley held the assets in this account as joint tenants with right of survivorship. (Doc. 165, p. 3).

89. RJ Account 975 was opened on December 19, 2003. (Doc. 165, p. 3). The manager of the account was Rob Bandy, who testified at trial.

90. Mr. Bandy testified that he was previously an account manager at a company called Morgan Keegan & Company, Inc. ("Morgan Keegan"). (Doc. 192, pp. 45–46). Dude and Shirley opened a joint account with Morgan Keegan—with Mr. Bandy as account manager—in October of 2003. (Shirley's Ex. 75).

91 Initially, Dude placed $1,000,000.00 into the Morgan Keegan account, but within a short period of time, Dude added another $12,000,000.00 to the account. (Doc. 192, p. 48).

92. Mr. Bandy then became employed by Raymond James, and the Morgan Keegan account in Dude and Shirley's name containing approximately $13,000,000.00 was transferred to Mr. Bandy's new employer and renamed RJ Account 975. (Doc. 165, p. 3). Plaintiffs and Brian were named the sole remainder beneficiaries of that account. (Plaintiffs' Ex. 314).

93. When Dude and Shirley opened the Morgan Keegan account in 2003, they stated that their approximate net worth was $50,000,000.00 and their liquid net worth was $30,000,000.00. (Shirley's Ex. 75).

94. At the time of Dude's death, RJ Account 975 had grown in value from $13,000,000.00 to $50,948,766.08. (Doc. 165, p. 3). This account became Shirley's by operation of law after Dude's death.

95. At the time of Dude's death, RJ Account 975 contained the following assets:

- 178,796 shares of Apple stock, which due to a 4 to 1 stock split on August 31, 2020, is now represented by 715,184 shares (Doc. 165, p. 3);
- 3,008 shares of Alphabet, Inc. (Class C), *id.*;
- 3,000 shares of Alphabet, Inc. (Class A), *id.*;
- 455,806.9 shares of J.P. Morgan Municipal Money Market Fund, *id.*;
- 4,676 shares of ConocoPhillips stock, *id.*;
- 5,000 shares of Exxon Mobil Corporation stock *id.*;
- 12,400 shares of Intel Corporation stock, *id.*;
- 2,338 shares of Phillips 66 stock, *id.*;
- 3,120 shares of Procter and Gamble stock, *id.*;
- 700 shares of Tesla Incorporated stock, *id.*;
- 95 shares of Nortel Networks Corporation stock (Nortel Networks is now defunct), *id.* at p. 4;
- 44,122 shares of Invesco Charter Fund (Class A), *id.*;
- 249,153 shares of Invesco High Yield Municipal Fund (Class A), *id.*;
- 66,090 shares of Invesco Limited Term Municipal Income Fund (Class A), *id.*;
- 22,865 shares of American Balanced Fund (Class A), *id.*;

- 21,156 shares of Artisan Mid Cap Value Fund (Investor Class), *id.*;
- 15,525 shares of Black Rock Global Allocation Fund (Class A), *id.*;
- 36,107 shares of Black Rock Multi Asset Income Portfolio Fund (Class A), *id.*;
- 6,440 shares of Capital World Growth & Income Fund (Class F), *id.*;
- 21,034 shares of Franklin High Yield Tax Free Income Fund (Class A), *id.*;
- 8,196 shares of Growth Fund of America (Class F1), *id.*;
- 23,080 shares of Hartford Mid Cap Fund (Class A), *id.*;
- 67,237 shares of Highland Floating Rate Opportunities Fund (Class A), *id.*;
- 57,982 shares of Perkins Mid Cap Value Fund (Class A), *id.*;
- 37,203 shares of Lord Abbett Value Opportunities Fund (Class A), *id.*;
- 28,045 shares of MFS Municipal Limited Maturity Fund (Class A), *id.*;
- 145,234 shares of MFS Arkansas Municipal Bond Fund (Class A), *id.*;
- 87,715 shares of MFS Municipal High Income Fund (Class A), *id.* at p. 5;

- 21,244 shares of PIMCO Global Multi Asset Fund (Class A), *id.*;
- 81,283 shares of Pioneer Classic Balanced Fund (Class A), *id.*;
- 11,194 shares of T. Rowe Price Media and Telecommunications Fund, *id.*;
- 76,159 shares of Prudential Municipal High Income Fund (Class A), *id.*;
- 69,685 shares of Prudential Jennison Small Company Fund Inc. (Class A), *id.*;
- 67,920 shares of Wells Fargo Strategic Municipal Bond Fund (Class A), *id.*;
- 15,000 shares of Ishares Silver Trust, *id.*;
- 2,000 shares of SPDR Gold TR Gold SHS, *id.*; and
- $100,000.00 par value Grand River Dam Authority Oklahoma Revenue Bonds, Series 2008 A (386442TE7), *id.*

g. Joint Raymond James Investment Account Ending in 124

96. At the time of Dude's death, he and Shirley jointly owned another Raymond James account ending in 124 ("RJ Account 124"). At all relevant times, this account held 208 shares of American Airlines Group stock. (Doc. 165, p. 5).

97. Dude and Shirley opened RJ Account 124 on March 6, 2014. (Doc. 165, p. 5).

98. At the time of Dude's death, this account became Shirley's by operation of law.

h. Dude's Joint RJ Accounts 975 and 124 Traced to Shirley's RJ Account 061

99. In May of 2017, the month after Dude passed away, Shirley requested that RJ Accounts 975 and 124 be journaled to a new Raymond James account in her separate name. (Doc. 165, p. 5).

100. Shirley's separate Raymond James account ends in 061 ("RJ Account 061"). She reduced Plaintiffs' remainder interest in the new account to 40%. *See* Doc. 104-14, p. 2. And after that, she eliminated their interest entirely. *See id.* at p. 3.

101. As of July 31, 2017, Shirley's RJ Account 061 had a total value of $52,728,621.21. (Doc. 165, p. 5).

102. As of December 2020, Shirley's RJ Account 061 had a total value of $95,080,993.53. (Doc. 165, p. 5).

103. As of May 28, 2021, Shirley's RJ Account 061 held the following assets:

- Client Interest Program (Cash Equivalent) in the amount of $4,223,260.44, (Doc. 165, p. 5);
- Raymond James Bank Deposit Program (Cash Equivalent) in the amount of $2,455,156.09, *id.* at p. 6;
- 501,864 shares of Apple stock, *id.*;
- 2,228 shares of Alphabet, Inc. (Class C), *id.*;
- 2,450 shares of Alphabet, Inc. (Class A), *id.*;

- 208 shares of American Airlines Group stock, *id.*;
- 750 shares of Coinbase Global, Inc. stock, *id.*;
- 4,676 shares of ConocoPhillips stock, *id.*;
- 5,000 shares of Exxon Mobil Corporation stock, *id.*;
- 1,840 shares of Home Depot, Inc. stock, *id.*;
- 2,338 shares of Phillips 66 stock, *id.*;
- 650 shares of Roper Technologies stock, *id.*;
- 5,800 shares of Verizon Communications stock, *id.*;
- 132,563 shares of Invesco High Yield Municipal Fund (Class A), *id.*;
- 11,468 shares of Invesco Limited Term Municipal Fund (Class Y), *id.* at p. 7;
- 16,477 shares Black Rock Multi Asset Income Portfolio Fund (Class N/L), *id.*;
- 12,443 shares Franklin High Yield Tax Free Income Fund Advisor (Class N/L), *id.*
- 114,191 shares MFS Arkansas Municipal Bond Fund (Class I), *id.*;
- 30,553 shares of MFS Municipal Limited Maturity Fund (Class I), *id.*;
- 102,416 shares MFS Municipal High Income Fund, *id.*;

- 9,697 shares T. Rowe Price Communications and Tech Fund (Investor Class), *id.*;
- 37,573 shares PGIM Municipal High-Income Fund (Class Z), *id.*;
- 38,093 shares Wells Fargo Strategic Municipal Bond Fund (Class I), *id.*; and
- 2,000 shares SPD Gold Shares, *id.*

104. The assets in RJ Account 975 that are no longer in Shirley's RJ Account 061 were sold by Shirley. The liquidated proceeds passed through RJ Account 061 and were then used by Shirley for her own purposes. *See* Plaintiffs' Exs. 257–305 & 332; Doc. 188-3.

105. In the years following Dude's death, the publicly traded stock that Dude had previously held in RJ Account 975 earned cash dividends. Those cash dividends were not automatically reinvested but were instead deposited into Shirley's RJ Account 061. The total amount of cash dividends paid since Dude's death is $1,197,081.13. (Doc. 188-2, listing exhibit numbers).

4. 2012 Christmas Gifts

106. Each of the four Plaintiffs and Brian received a cash Christmas gift from Dude and Shirley in December of 2012.

107. Each recipient received the same amount: $1,648,000.00. (Doc. 165, p. 2).

108. Just before these gifts were given, Dude executed his 2012 will, (Doc. 38-3, pp. 5–28), which created a trust called the Bypass Trust for the benefit

of the four Plaintiffs and Brian. The Bypass Trust was to be funded with any asset of Dude's estate that was available to pass through probate free of taxes. *Id.* at § 2.2.A(a).

109. When Dude and Shirley gave Plaintiffs these gifts, they told them that the gifts exhausted Dude's remaining lifetime gift and estate tax credit. (Doc. 165, p. 2). Mimi confirmed this fact in her testimony. (Doc. 191, p. 184). Separate Plaintiff Cathee Crain testified that Dude deposited the 2012 Christmas gifts into the Plaintiffs' individual trust accounts. *Id.* at pp. 223–24.

110. The individual lifetime gift exclusion amount in 2012 was $5,120,000.00. In 2017, the individual lifetime gift exclusion amount was $5,490,000.00. (Doc. 191, pp. 139–40).

111. There is no evidence that Dude intended the 2012 Christmas gifts to satisfy, in whole or in part, his contractual obligations to Plaintiffs under the PSA.

112. Shirley did not prove that any other gift Dude gave to Plaintiffs during his lifetime was given in satisfaction of his contractual obligations under the PSA.

B. Conclusions of Law

1. General Principles: Imposition of a Constructive Trust

As previously explained in the Court's Memorandum Opinion and Order on summary judgment (Doc. 147), Dude breached the PSA when he

failed to leave at least one-half of his estate to Plaintiffs. His 2012 will was insufficient. The remedy for breach of contract is specific performance; however, because Dude passed away and Shirley did not open a probate estate at the time of his death, his separate assets remained in her possession, and she either retained them or sold them as she saw fit. Other assets Dude and Shirley owned jointly at the time of his death passed to Shirley by operation of law, and once again, she either kept those assets or sold them.

After considering Shirley's testimony at trial, the Court will accept at face value that she was unaware of Dude's contractual obligations under the PSA until Plaintiffs filed this lawsuit against her and Dude's estate on March 27, 2020. By contrast, one of the Plaintiffs, Mimi, testified that she was aware of her father's PSA obligations as early as 1988, even before her parents were divorced. At trial, the other three Plaintiffs, Cathee, Lisa, and Kristan, stipulated that they were also aware of the PSA's requirements at least at the time of their parents' divorce in 1989. (Doc. 192, p. 140). This means all four Plaintiffs knew that Dude was contractually obligated to leave them one-half of his estate throughout the twenty-seven years Dude and Shirley were married.

As to why Plaintiffs waited almost three years after Dude's death to file suit, the Court surmises that the decision must have depended on Shirley's actions around that time. As already noted, most of Dude's personal wealth was held in his and Shirley's joint RJ Account 975. Plaintiffs were the sole remainder beneficiaries of that account, along with Shirley's son

Brian, as of the date Dude passed away. If their beneficial interest had remained unchanged, Plaintiffs would have been poised to collectively inherit 80% of the assets in that joint account once Shirley died. However, within a month of Dude's death, Shirley reduced Plaintiffs' remainder interest in the account to 40%. And then she eliminated their interest altogether—something she was capable of doing as sole owner of the account, but perhaps should not have done. Though Plaintiffs' decision to file suit several years after Dude's death greatly complicated the task of tracing and valuing assets, it is also true that Shirley's decision to remove Plaintiffs as remainder beneficiaries more than a year after his death must have influenced the timing of this lawsuit. Therefore, to the extent the Court refers to Shirley in the discussion below as an "innocent" recipient of Dude's estate, that term is qualified by the Court's observations above.[8]

The Court looks to Arkansas law when determining Plaintiffs' remedy for breach of contract. According to state law, "A constructive trust is imposed where a

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[8] To be sure, the Court finds troubling several of Shirley's actions *after* Dude died. For example, Shirley had to have known about Dude's 2012 will because she was present with Dude and the lawyer who prepared it. Yet, Shirley did not seek to probate Dude's separate assets in the manner dictated by the will. And when the Plaintiffs petitioned to open a probate estate, Shirley initially filed the 1993 will that left Plaintiffs nothing. When questioned at trial about these decisions, she testified, "I forgot all about that [2012] will because . . . I had been through several chemo, radiation, comas, a lot of things." (Doc. 190, p. 214). The Court finds her explanation to be not credible.

person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." *Cox v. Miller*, 210 S.W.3d 842, 848 (Ark. 2005). Here, Shirley—though she may not have known it at the time—was under a legal duty to maintain Dude's assets after his death so half of it could be conveyed to Plaintiffs. The "wrongful disposition of another's property" will create a "duty to convey the property" by means of a constructive trust "without regard to the intention of the person who transferred the property." *Id.* at 849. In other words, even though Shirley believed she was entitled to inherit all of Dude's property, both separate and joint, the property was, in a sense, encumbered by a prior legal obligation. Dude signed the PSA prior to his marriage to Shirley, so this obligation took precedence over Shirley's ordinary inheritance rights as a widow pursuant to Arkansas law. *See Gregory v. Estate of Gregory*, 866 S.W.2d 379, 383 (Ark. 1993) (finding that "the superior contractual rights" of the deceased's children, who were beneficiaries of their father's contract to make a will, superseded the widow's dower and homestead rights).[9]

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[9] During trial, Shirley testified many times that she was told by her husband throughout their marriage, "What's mine is yours, and what's yours is mine." (Doc. 190, pp. 125, 133, 136). If Dude's representations were accurate, then it might be understandable why Shirley would have believed that all of Dude's assets—both in life and in death—were also hers. It would also explain why Shirley views the act of carving up these assets and distributing them to the Plaintiffs to be unjust. The problem, of course, is that Shirley was not told the truth about these assets during her marriage: *All that was Dude's was not hers*. He owed a preexisting obligation to his daughters. In all practical effect, half of Dude's

The Arkansas Supreme Court has recognized the "two competing public policies" at issue here: "the right of a couple to contract to make mutual wills that are irrevocable and that dispose of both estates to third-party beneficiaries, and the right of a surviving spouse to take an elective share." *Gregory*, 866 S.W.2d at 382. Under Arkansas law, the PSA's contractual provisions are "applicable to property held by the spouses in an estate by the entirety, even though it would not pass under the will of either spouse but would devolve on the surviving spouse by operation of law." *Janes v. Rogers*, 271 S.W.2d 930, 933 (Ark. 1954). This case presents complicated facts not often encountered by federal courts, but at bottom, this is a breach-of-contract dispute. The Court, sitting in diversity, must remedy the breach using its legal and equitable powers.

For the assets that were owned individually by Dude and are subject to probate court jurisdiction, this Court is nevertheless empowered to adjudicate the parties' rights in such property and enter an order declaring such rights. *See Marshall v. Marshall*, 547 U.S. 293, 310 (2006) (establishing that federal courts have "jurisdiction to adjudicate rights in property" that is within the custody of the probate court). For the assets that were jointly held and therefore will not pass through probate, this Court has the authority, under

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assets were at all times encumbered by the PSA. Possibly he tried to address that obligation by creating his 2012 will and by naming his daughters as beneficiaries of the joint RJ Account 975; but as we know now, the 2012 will was not enough to satisfy his obligations under the PSA, and Shirley removed Plaintiffs as remainder beneficiaries of the joint account after Dude's death.

Federal Rule of Civil Procedure 70, to divest Shirley of title and vest it directly in Plaintiffs. *See* Fed. R. Civ. P. 70(b); Howard W. Brill, Equity and the Restitutionary Remedies: Constructive Trust, Equitable Lien, and Subrogation, 1992 ARK. L. NOTES 1, 5 (1992) ("[I]f the property is within the jurisdiction of the court, the court may divest the defendant of title and directly vest it in the plaintiff.").

2. Burdens of Proof

"A constructive trust is simply an equitable remedy." *Cole v. Rivers*, 861 S.W.2d 551, 553 (Ark. Ct. App. 1993). The party seeking the imposition of a constructive trust must persuade the court, sitting in equity, through clear and convincing evidence. *Nichols v. Wray*, 925 S.W.2d 785, 789 (Ark. 1996).

> Clear and convincing evidence is evidence by a credible witness whose memory of the facts about which he testifies is distinct, whose narration of the details is exact and in due order, and whose testimony is so direct, weighty, and convincing as to enable the factfinder to come to a clear conviction, without hesitance, of the truth of the facts related. It is simply that degree of proof that will produce in the trier of fact a firm conviction of the allegations sought to be established.

First Nat'l Bank of Roland v. Rush, 785 S.W.2d 474, 479 (Ark. Ct. App. 1990).

In the case at bar, Plaintiffs agree that they bore the burden of identifying at trial which property Dude owned and controlled just prior to his death and any

growth or increase in that property since his death, while Shirley agrees that she bore the burden of proving any entitlement to a setoff or credit. (Doc. 165, p. 1). The parties introduced thousands of pages of evidence at trial, including the testimony of the parties and several experts, as well as reams of documents that included business records, financial reports, and tax returns. Appellate courts in Arkansas ordinarily "defer to the superior position" of the trial court "to evaluate the evidence" and will not reverse a finding "that the disputed fact was proved by clear and convincing evidence" unless that finding was "clearly erroneous." *Nichols*, 925 S.W.2d at 789. "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.*

3. Arkansas Law Regarding Jointly Held Property

The most disputed properties are those that were held jointly by Dude and Shirley as husband and wife, either in tenancies by the entirety or joint tenancies with right of survivorship. These jointly held properties passed by operation of law to Shirley after Dude died. According to the Arkansas Supreme Court, a "[t]enancy by the entirety is a joint tenancy modified by the common law doctrine that husband and wife are one person in law, and cannot take by moieties." *Parrish v. Parrish*, 235 S.W. 792, 794 (Ark. 1921). "Thus neither spouse owns an undivided one-half interest in any entirety property—the entire entirety estate is vested and held in each spouse." *Wood v. Wright*, 386 S.W.2d

248, 251 (1965). This means that when Dude was alive, he and Shirley each owned 100% of the funds in their joint banking and investment accounts. Dude could have legally withdrawn 100% of such funds without Shirley's permission—and vice versa—since they each legally owned an undivided interest in the joint accounts.

Though the facts at trial proved that Dude contributed 100%--or very close to that—of the consideration used to fund his and Shirley's joint accounts and joint real property, when one spouse furnishes all the consideration to buy joint marital property, Arkansas law dictates that "there is a presumption of a gift to the other [spouse] from the one furnishing the consideration." *Jones v. Wright*, 323 S.W.2d 932, 933 (Ark. 1959) (citation and quotation marks omitted). That gift represents "half the value of the use [of the property] during their joint lives and of the right of survivorship" after death. *Id.* (citation and quotation marks omitted). "This presumption, although a strong one, may be overcome by clear and convincing proof that no such gift was intended." *Bank of Roland*, 785 S.W.2d at 478.

The Court interprets the holding in *Jones* to mean that even though Dude provided the consideration used to purchase all marital assets, he minimally gifted "half the value of the use" of such property to Shirley to use and enjoy during their marriage and he attempted to gift the whole of such property outright to her at death—which follows the legal definition of "right of survivorship." Gifting "the use" of jointly held property

is not the same as making a completed gift of ownership.

It is clear that Dude made four completed gifts to Shirley of property purchased with marital funds: (1) 509 Doubletree Trail, Flower Mount, Texas; (2) 4806 West Trail Dust Street, Fayetteville, Arkansas; (3) 641 64th Avenue, Marathon, Florida; and (4) Prudential Annuity Contract Number E0483716. All four of the above assets were specifically titled in Shirley's name. The Court is well persuaded that Dude and Shirley understood the distinction between properties Shirley legally owned separately—as a result of completed gifting—and property she owned jointly with Dude. If Dude had wanted to gift Shirley with title to more separate property than the four assets itemized above, he knew how to do so. Moreover, the presumption of a gift becoming complete upon the fruition of survivorship rights is trumped by Plaintiffs' superior contractual rights under the PSA. The same is true of Shirley's dower and curtesy rights. *See supra*, pp. 35–36.

4. Shirley's Equitable Interest in Jointly Held Property

Since the Court's task is to impress a constructive trust on the assets Dude owned shortly before his death, the next question is whether Shirley acquired an equitable interest in any of the couple's joint assets during Dude's lifetime. Equitable ownership is different from the right to use and enjoy property. Certainly, Shirley had the right to use and enjoy all jointly held marital property while Dude was alive; however, the Court must discern, by clear and

convincing evidence, whether she established equitable *ownership* of any jointly held property during Dude's lifetime, by virtue of her contributions in maintaining, developing, or increasing the value of any jointly held property. *Cf. Nelson v. Nelson*, 590 S.W.2d 293, 296 (Ark. 1979) (finding that evidence of a spouse's joint work, labor, management, and acquisition of property entitled her to "equitable ownership of one-half interest in [the] property").

The most convincing evidence Shirley presents of her equitable interest in joint property is the fact that Dude was mentally and physically incapacitated during the last three years of his life and required around-the-clock care. Plaintiffs did not dispute this. They also did not dispute that during these years, Shirley singlehandedly ran (or at least had the responsibility to oversee) all the joint businesses, maintained all joint property, and handled all joint investment decisions. Before trial, Plaintiffs threatened to put on proof that Shirley had "little to no involvement in Dude's companies" and instead employed business tactics that were "distracting." *See* Plaintiffs' Amended Pretrial Brief, Doc. 173-1, p. 17. However, they never presented such proof.

For her part, Shirley testified that she was involved in all aspects of the businesses from the beginning of the marriage. For example, she testified that she maintained an office at Dude, Inc. (Doc. 190, p. 137). She said that when Dude "would anticipate doing a deal for a job," he would ask her "to find out as much about the background of say another company that [they] were anticipating looking at, or if [they] were

going to hire somebody, or just the detail end of it." *Id.* And then she and Dude would get together and talk about what she had discovered, and "a lot of times, he did things on his own and then would bring them back to [Shirley] to look at." *Id.* She also personally met with customers and traveled with Dude to the foam production plants. *Id.* When her counsel asked whether she was involved in "reviewing the financials of customers," Shirley responded, "Not to some great degree," as "numbers don't sit in [her] head very long," but that she could be counted on to tell "if something is a good or a bad deal based upon the bottom line." *Id.* at p. 138. In other words, the Court concludes that Dude consulted with Shirley, relied on her instincts, and made her aware of certain aspects of the businesses over time. And by the time Dude was incapacitated in 2014, Shirley knew enough about the businesses and investments to run them herself.

Still, while attempting to carrying her burden here, Shirley offered no theories or guiding principles as to how the Court should quantify her contributions to the various businesses prior to 2014. Further, although she identified herself as "the liaison" between the various companies and the accountant who prepared all business tax returns during the marriage, *id* at p. 24, she constantly disputed the accuracy of those tax returns during the trial, particularly when she understood that the returns had failed to substantiate her position regarding her legal ownership of Dude's separate property. *See, e.g., id.* at p. 31. She also admitted she was not "vigilant" in focusing on the details of the tax returns and only tended to worry about the bottom-line amount that she and Dude owed

in taxes. *Id.* at p. 103. Finally, with respect to Shirley's investment decisions, Rob Bandy, the manager of the Crain family's Raymond James investment accounts, testified that Shirley was instrumental in growing those accounts since 2014, *see* Doc. 192, p. 62; however, there was little evidence offered about her role in investment decisions, and how to value that work, prior to 2014.

Shirley's credibility also suffered some damage during the trial. She blamed recent lapses in memory—particularly her decision to submit Dude's outdated will from 1993 to the probate court—to the effects of chemotherapy and radiation treatment she underwent several years ago. *See, e.g.*, Doc. 190, p. 214. She also claimed that until the instant litigation began, she did not quite remember—due to her "spotty memory" from the effects of chemotherapy—who owned shares in Regional Jet Center. *Id.* at p. 216. She even testified—incredibly—that she "really didn't remember that even [her] son had 1/6th" of the shares in this family business "until [she] started looking for the papers that [she] was asked to look for" in this lawsuit. *Id.*

The Court therefore concludes that Shirley's equitable contribution to the joint businesses and joint investment and bank accounts from 1989 to 2014 was more than negligible, but impossible to quantify under a clear-and-convincing evidence standard. What she did prove was that she solely managed the joint businesses and accounts during the last three years of her marriage, while Dude was incapacitated. By comparison, Dude had zero involvement in the

managing of the joint businesses and accounts in those years. Since Dude and Shirley were married for a bit less than thirty years, three years of that time is roughly equal to 10% of the length of the marriage. The Court therefore finds that Shirley established an equitable right to ownership of 10% of the couple's jointly-held businesses, joint investment accounts, and joint bank accounts, which is equal to approximately the percentage of time in the marriage that these joint assets were under her sole control. Pursuant to this finding, and for the purpose of impressing a constructive trust, only 90% of these *joint* assets will be considered for inclusion in Dude's "estate" at the time of his death, while 100% of Dude's *separate* assets passing through probate will be subject to Plaintiffs' legal claim.

Regional Jet Center

One important exception to the Court's decision above concerns Dude and Shirley's joint interest in Regional Jet Center. This business asset is different from the rest because when Dude first formed the company, he decided to share ownership equally with the four Plaintiffs and Brian. Dude and Shirley owned one-sixth of the business, Brian owned one-sixth, and the Plaintiffs collectively owned four-sixths. It follows that since the Plaintiffs have always owned more than half of Regional Jet Center, Dude fulfilled his PSA obligations with respect to this particular asset. Moreover, the Court is persuaded that Shirley has been personally involved in the day-to-day management of this business over the years, and her individual contributions are substantial enough to make her the

sole equitable owner of the shares she once jointly owned with Dude. Accordingly, Shirley will maintain sole ownership of her Class A voting stock in Regional Jet Center, as well as any cash distributions she received from Regional Jet Center after Dude's death.

Jointly Held Real Property

Another exception applies with respect to certain jointly held *real* property. The Court finds that Shirley proved her equitable ownership to more than a 10% interest in three homes that she shared with Dude prior to his death. First, she established that she equitably owned half of the couple's marital home located at 10101 Dallas Street, Fort Smith, Arkansas. She testified credibly that she fully designed the home, coordinated with the architect and the contractors in selecting all building materials and making sure all construction work was completed, and selected all furnishings and artwork. (Doc. 190, pp. 126–27). Though Dude provided the monetary consideration for the home, Shirley contributed "sweat equity" in the form of significant creative and managerial decision-making and time-related investments beginning in 2003, when the land was first purchased, and continuing to the date of Dude's death in 2017.

Second, Shirley established equitable ownership of half of the ranch at 3655 Beach Way, in Van Buren, Arkansas. Dude paid the monetary consideration for this home in 1992, shortly after he and Shirley were married, but she credibly testified that she was responsible for overseeing the tear down of an existing home on the land and for building the current structure. (Doc. 190, p. 128). She took care of several

horses on the land and materially contributed to decisions about how the land and fixtures that ran with the land would be maintained.

Third, Shirley established a one-half equitable ownership interest in the couple's vacation home located at 201 West Seaview Drive in Marathon, Florida. Shirley credibly testified that Dude provided the consideration to purchase the home in 1994, but it "was in terrible condition," so Shirley directed the renovation of the property and the decoration. (Doc. 190, p. 130). She and Dude spent "quite a bit of time there." *Id.* In addition, Shirley testified that a least three hurricanes did damage to the home, and the last hurricane that struck just prior to Dude's death "pretty much demolished the understructure," such that she and Dude decided to "start over" and build the home from scratch. *Id.* at p. 131. Construction began in 2016, while Dude was fully incapacitated, and Shirley oversaw and directed the work. *Id.*

However, other than the three properties specifically noted above, Shirley did not meet her burden to prove any equitable ownership interest in jointly held real property.

5. Equitable Treatment of Property No Longer in Shirley's Possession

Several assets that were owned jointly by Dude and Shirley at the time of Dude's death are no longer in Shirley's possession. Plaintiffs are the rightful owners of some of this property, pursuant to the PSA. Under English common law, the rightful owner of property subject to a constructive trust may follow and retake

her property from the trustee only if it "[can] be ascertained to be the same property, or the product or proceeds thereof"; however, the "right cease[s] when the means of ascertainment fail[s], as when the subject of the trust was money, or had been converted into money, and then mixed and confounded in a general mass of money of the same description, so as to be no longer divisible or distinguishable." *Nonotuck Silk Co. v. Flanders*, 58 N.W. 383, 384 (Wis. 1894) (citing cases).

> The Restatement (Third) of Restitution § 59 provides:
>
> (1) If property of the claimant is deposited in a common account or otherwise commingled with other property so that it is no longer separately identifiable, the traceable product of the claimant's property may be identified in (a) the balance of the commingled fund or a portion thereof, or (b) property acquired with withdrawals from the commingled fund, or a portion thereof, or (c) a combination of the foregoing, in accordance with the rules stated in this Section.

Id. at § 59(1).

Subsections (2) and (3) set forth the rules for determining a claimant's right to assets in a commingled fund. Subsection (2) states:

> (2) If property of the claimant has been commingled by a recipient who is either a wrongdoer (§ 51) or responsible for unjust enrichment (§ 52), the following rules apply: (a) Withdrawals that yield a traceable product

> and withdrawals that are dissipated are marshaled so far as possible in favor of the claimant. (b) Subsequent contributions by the recipient do not restore property previously misappropriated from the claimant, unless the recipient affirmatively intends such application. (c) After one or more withdrawals from a commingled fund, the portion of the remainder that may be identified as the traceable product of the claimant's property may not exceed the fund's lowest intermediate balance.

Id. at § 59(2).

Subsection (3) explains what happens to commingled property when the recipient is "innocent" and did not obtain the property through fraudulent or deceptive means:

> (3) If property of the claimant has been commingled with property of an innocent recipient (§ 50), *the claimant may trace the property into the remaining balance of the fund* and any traceable product of the fund *in the manner permitted by § 59(2)*; *but restitution from the property so identified may not exceed the amount for which the recipient is liable* . . . .

Id. at § 59(3) (emphasis added). In other words, even with an innocent recipient, the general "marshaling rule" explained in § 59(2) applies.

> The composite elements of this "marshaling" are, of course, (1) *the presumption that the holder of the commingled fund dissipates [her] own money first* (so long as the balance permits), and (2) the

> contrary presumption that the holder is withdrawing the claimant's money (again so long as the balance permits), if the claimant seeks to identify an asset acquired by withdrawal as the traceable product of the claimant's funds.

Id. at § 59, cmt. d (emphasis added).

Here, the Court finds that Shirley was an innocent recipient of Dude's assets held in their joint accounts. Plaintiffs are the "claimants"—using the Restatement's terminology—who maintain that pursuant to the PSA, only half the assets Shirley received legally belonged to her, while the other half belonged to Plaintiffs. We know that after Dude's death Shirley retitled the RJ accounts in her sole name and that she retained most of those exact same stocks in her new account. And the proceeds of the stocks that she did sell are easily traceable. So, a remaining question is: When Shirley sold some of Dude's assets, should the Court assume that the assets sold were from Shirley's half and not Plaintiffs'? Based on the Court's reading of the Restatement, it appears the answer to that question is "yes." Plaintiffs explain that if the Court adopts this methodology when placing assets into a constructive trust,

> Plaintiffs may end up with more than one-half of the assets Shirley *currently* controls, [but] Shirley will not be left in a "worse off" position: She has withdrawn and spent (not reinvested) over 30 million from the Raymond James investment account since Dude's death in 2017, and Plaintiffs are not seeking any of those funds.

> (*See* Pls.' Exs. 264, 276, 288, 300, and 332, showing the total annual withdrawals from the Raymond James investment account from 2017 to present).

(Doc. 188, p. 8).

Plaintiffs argue that "[t]o prevent unjust enrichment of the $30 million Shirley has withdrawn and sold," her withdrawals from the joint accounts must be subtracted from *her* half, and not from Plaintiffs' half. *Id.* The Court agrees. So, if 100 shares of company XYZ were Dude's when he died, and Shirley sold 50 shares sometime after his death, Plaintiffs would be entitled to the 50 shares remaining in the account, as under Plaintiffs' theory it would be assumed Shirley sold her own shares first. Importantly, Plaintiffs claim no entitlement to the assets Shirley acquired with sale proceeds from *her portion* of the jointly held shares.[10]

According to the Raymond James account statements, Account 061 nearly doubled in value from July 2017 to December 2020. *See supra*, ¶¶ 101–02. This was likely due to the incredible rise in the stock market during those years. The Plaintiffs and Shirley will equally benefit from the gains the stock market produced—just as they would have equally suffered losses had the market taken a downward turn. The

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[10] For example, Shirley liquidated shares of Apple stock after Dude's death and used the proceeds to buy a jet. Since it is presumed in the law that Shirley sold her own Apple shares first, and not the Plaintiffs', the jet belongs to Shirley, and Plaintiffs cannot claim an ownership interest in the jet.

Restatement provides that "[a]n innocent recipient" like Shirley "may be liable in an appropriate case for use value or proceeds [of an asset], but not for consequential gains." Restatement (Third) Restitution § 50(5). This Court finds that Shirley is liable to the Plaintiffs for the "use value" and "proceeds" of the stocks that remained in this account after Dude's death and increased in value.[11]

To the extent there is insufficient cash to cover Plaintiffs' share of jointly held assets, a constructive trust may be imposed on an asset that is "an effective substitute for another, even if the substitute would not meet [the] normal definition of 'traceable product,'" if "there is an unmistakable relationship between the claimant's loss of one . . . asset and the recipient's gain of another," and the "circumstances of the transaction reveal unjust enrichment of the recipient at the expense of the claimant." Restatement (Third) Restitution § 58, cmt. f. Therefore, to the extent Plaintiffs' assets are traced to an account that does not contain sufficient funds, other assets within that same

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[11] "Proceeds" are defined in the Restatement as "the direct product of an asset," and they include "ordinary income or accretion in respect of the original asset." Restatement (Third) Restitution § 53(2). By contrast, a "consequential gain" results from an innocent recipient's "subsequent dealings with such an asset," which requires affirmative "intervention" on the recipient's part to affect the value of the asset. Restatement (Third) Restitution § 53(3) & reporter's note c. Here, the accretion in value of the stock owned by Dude at the time of his death is the result of Shirley's passive holding of stock in a bull market. There is no credible evidence that Shirley actively intervened to cause the value of RJ Account 061 to double, so she is not entitled to keep all of that value as a consequential gain.

account—or assets purchased from commingled funds that were previously held in that account—may be substituted and liquidated to pay Plaintiffs.

6. Treatment of the 2012 Christmas Gifts

For a gift to be applied towards satisfaction of Dude's obligation under the PSA, a reference to such obligation must be tied to the transaction; otherwise, it is merely a gift that does not reduce the balance of the obligation. *See* 95 C.J.S. Wills § 137. Shirley failed to prove by clear and convincing evidence that Dude intended the 2012 Christmas gifts to partly satisfy his contractual obligation to Plaintiffs under the PSA. Though Plaintiffs understood these gifts were advances on their inheritance, such advances were not necessarily made in satisfaction of the PSA. Dude could have left Plaintiffs more than one-half of his estate; no clear and convincing evidence exists to persuade the Court that the 2012 gifts were made *in partial satisfaction of* the PSA, as opposed to *in addition to* the PSA. Therefore, these gifts will not be credited back to the estate or serve as an offset to the amounts owed by the estate to Plaintiffs.

C. Application of Law to Findings of Fact

Based on the Court's findings of fact and conclusions of law as set forth above, the following assets (or interests therein) are impressed with a constructive trust for Plaintiffs' benefit.

1. Assets Dude Owned Individually[12]		
Asset	**Portion Impressed with Constructive Trust for Plaintiffs' Benefit**	**Explanation and Tracing**
a. RJ Account 827 • Deposit Program	$107,224.47, cash	This cash amount equals 50% of the Raymond James Bank Deposit Program holdings on the date of Dude's death. These funds are traced to Shirley's Bank Deposit holdings in RJ Account 450

[12] This table reflects the Court's adjudication of Plaintiffs' rights in Dude's separate assets at the time of his death—even though his separate property must pass through probate. Marshall, 547 U.S. at 310. Thus, the assets itemized here are impressed by the constructive trust but the actual transfer will be administered by the Sebastian County Probate Court. In this regard, it should be made known that Plaintiffs stipulated in open court on the last day of trial, July 21, 2021, that they will only claim through the probate process those assets (itemized here) that are impressed by the constructive trust for their benefit. *See* Doc. 192, p. 260 ("The plaintiffs anticipate and will make no claim for any assets out of that probate estate, other than the assets that may be under a constructive trust issued by this Court.").

• Highland Income Fund (HFRO)	1,054 shares	This amount of shares equals 50% of the shares Dude held in this account at the time of his death. These shares are traced to RJ Account 450.
• Oppenheimer Steelpath MLP Income Fund Class A	$184,682.48, cash	This cash amount equals 50% of the proceeds Shirley received from the sale of 88,578.159 shares on or about February 26, 2020. These proceeds are traced to RJ Account 450.
b. Dude, Inc.	50% of all outstanding shares	
c. Premier Foam, Inc.		
• Shares	50% of all outstanding shares	

• Distributions	$1,620,000.00, cash	This cash amount represents 50% of the cash distributions Shirley received from Premier Foam, Inc., after Dude's death. These proceeds are traced to Shirley's BancorpSouth checking account ending in 6671.[13]
d. Dude's Separate Personal Property and Household Effects	50% of the separate personal property and household effects Dude owned at the time of his death	The entirety of such items will be inventoried by the Administrator in the normal course of the probate proceedings, and as ultimately determined by the probate court.

[13] If the cash in this account is insufficient to fund the constructive trust for Plaintiffs benefit, then—by agreement of the parties—Shirley will substitute equivalent assets from her RJ Account 061. More specifically, the parties stipulated that after Dude's death, Shirley gave a gift of $6,000,000.00 to Mr. Pope, at least $4,650,000.00 of which came from her BancorpSouth checking account ending in 6671. (Doc. 172-1, p. 2). They further agreed that if the BancorpSouth 6671 account balance is insufficient to pay Plaintiffs for any assets that the Court traces to the account, then Shirley will substitute equivalent assets for her RJ Account 061. *Id.* at pp. 2–3.

2. Real Estate Dude Owned Jointly with Shirley[14]		
Asset	**Portion Impressed with Constructive Trust for Plaintiffs' Benefit**	**Explanation and Tracing**
a. 1010 Dallas Street, Fort Smith, Arkansas	25% ownership interest in this property $7,070,250.00 assessed value	Shirley may elect whether to execute a deed transferring 6.25% ownership interest to each of the four Plaintiffs or to pay the Plaintiffs collectively the cash equivalent of 25% ownership interest in this property, which the Court finds is equal to $1,767,562.50.

[14] The Real Property described in this table was jointly held by Dude and Shirley. Upon Dude's death the entirety of his interest passed to Shirley by operation of law. It is therefore not anticipated that these properties will pass through the probate estate. The properties are nevertheless impressed by the constructive trust and Shirley is responsible for conveying directly to (or buying out) Plaintiffs' ownership interests as described in this table.

b. 3655 Beach Way, Van Buren, Arkansas		
• Property	25% ownership interest in this property $2,497,590.00 assessed value	Shirley may elect whether to execute a deed transferring 6.25% ownership interest to each of the four Plaintiffs or to pay the Plaintiffs collectively the cash equivalent of 25% ownership interest in this property, which the Court finds is equal to $624,397.50.
• Rental Income	$12,718.06, cash	This cash amount equals 25% of the rent payments Shirley collected on this property since Dude's death. These proceeds are traced to Shirley's BancorpSouth checking account ending in 6671.
c. 201 West Seaview Drive, Marathon, Florida	25% ownership interest in this property	Shirley may elect whether to execute a deed transferring 6.25% ownership interest to each of the four Plaintiffs or to pay the

	$4,900,000.00 assessed value	Plaintiffs collectively the cash equivalent of 25% ownership interest in this property, which the Court finds is equal to $1,225,000.00.
d. 6201 State Line Road, Fort Smith, Arkansas • Property	50% ownership interest in this property $4,200,000.00 total property value as determined by the Court	Shirley may elect whether to execute a deed transferring 12.5% ownership interest to each of the four Plaintiffs or to pay the Plaintiffs collectively the cash equivalent of 50% ownership interest in this property, which the Court finds is equal to $2,100,000.00.

• Rental Income	$955,600.00, cash	This cash amount equals 50% of the rent payments Shirley collected on this property since Dude's death. These proceeds are traced to Shirley's BancorpSouth checking account ending in 6671.
e. 14805–07 Dutchman Drive, Rogers, Arkansas	$162,597.70, cash	This cash amount equals 50% of the net proceeds ($325,195.40) Shirley received for the sale of this property. These proceeds are traced to Shirley's BancorpSouth checking account ending in 6671.

3. Bank Accounts Dude Owned Jointly with Shirley		
Asset	**Portion Impressed with Constructive Trust for Plaintiffs' Benefit**	**Explanation and Tracing**
a. Bancorp South Joint Checking Account ending in 6671	$67,110.27, cash	This cash amount equals 45% of the cash contained in the account at the time of Dude's death ($149,133.94). These funds are traced to Shirley's BancorpSouth Checking Account ending in 6671.
b. Bancorp South Joint Checking Account ending in 2206	$55,297.52, cash	This cash amount equals 45% of the cash contained in the account at the time of Dude's death ($122,883.37). These funds are traced to Shirley's BancorpSouth Checking Account ending in 2206.[15]

[15] If the cash in this account is insufficient to pay Plaintiffs, Shirley testified that she purchased a number of assets after Dude passed away using funds from this account. *See* Doc. 190, pp. 60–63. Accordingly, the evidence at trial clearly and convincingly shows

c. Bancorp South Joint Checking Account ending in 1312	$7,273.05, cash	This cash amount equals 45% of the cash contained in the account at the time of Dude's death ($16,162.33). This account was closed on March 2, 2020, and Shirley withdrew all remaining funds in cash. These funds are therefore traced to Shirley's primary checking account, which is the BancorpSouth Checking Account ending in 6671.

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that the following assets are traced to this account, and if necessary, can be sold to pay any amount that is owed to Plaintiffs from this account: antique paintings from Sotheby's in the amount of $631,062.50 (Plaintiffs' Ex. 334.418); furnishings from Ida Manheim Antiques in the amount of $119,800 (Plaintiffs' Ex. 334.401); a Sea-Doo from Bradford Marine in the amount of $38,127.68 (Plaintiffs' Ex. 334.383); purchases from Neiman Marcus in the amount of $183,593.00 (Plaintiffs' Ex. 334.328); and a Mercedes Benz vehicle in the amount of $100,000.00 (Plaintiffs' Ex. 334.317).

4. Other Assets Dude Owned Jointly with Shirley		
Asset	**Portion Impressed with Constructive Trust for Plaintiffs' Benefit**	**Explanation and Tracing**
a. Cash Dividends Shirley Received Since Dude's Death	$1,077,373.02, cash	45% of all dividends paid on RJ Account 061 holdings ($2,394,162.26). Traced to RJ Account 061. (Doc. 188-2).
b. Loan to Brian Pope	$4,095,000.00, cash	This cash amount equals 45% of the total amount transferred from Dude and Shirley's joint accounts to Mr. Pope and his businesses, as a loan, prior to Dude's death. Shirley previously agreed that this amount shall be paid from cash or liquidated assets in Shirley's RJ account 061. *See* Doc. 172-1, p. 2.

c. Airport Transportation Company		
• Shares	45% of all outstanding shares	
• Distributions	$617,400.00, cash	This cash amount equals 45% of the distributions ($1,372,000.00) paid to Shirley since Dude's death. This cash is traced to Shirley's BancorpSouth account ending in 6671.

5. Stocks Dude Owned Jointly with Shirley				
Stock Name	**Ticker**	**No. of Shares Held in RJ Accts. 975 and 124 on the Date of Dude's Death**[16]	**Constructive Trust (45% of Shares Held at Dude's Death)**[17]	**Constructive Trust (45% of Stock Sale Proceeds)**[18]
Apple	AAPL	715,184	321,832.8	

[16] The number of shares held in Accts. 975 and 124 on the date of Dude's death reflects converted shares. In some instances, the shares that Shirley retained were converted from one class to another at some point following Dude's death. Because the present-day holdings reflect that new class, the number of shares held at Dude's death—45% of which will be impressed with constructive trust for Plaintiffs' benefit—were adjusted to reflect the stock's value at that point in time in converted shares.

[17] Among those shares held in Accts. 975 and 124 at the time of Dude's death that Shirley retained possession of, Acct. 061 holds sufficient shares—with one exception—to accommodate the portion of stock impressed with constructive trust for Plaintiffs' benefit.

[18] Doc. 188-3 provides the total sale proceeds resulting from each stock held in Accts. 975 and 124 at the time of Dude's death that was subsequently sold.

Alphabet, Inc., Class C	GOOG	3,008	1,353.6	
Alphabet, Inc., Class A	GOOGL	3,000	1350	
ConocoPhillips	COP	4,676	2,104.2	
Exxon Mobil Corporation	XOM	5,000	2250	
American Airlines Group	AAL	208	93.6	
Phillips 66 stock	PSX	2,338	1,052.1	
Invesco High Yield Municipal Fund, Class A	ACTHX (now ACTDX)	248,655	111,894.75	
Invesco Limited Term Municipal Income Fund, Class A	ATFAX (now ATFYX)	66,149	11,468[19]	

[19] Shirley retained 11,468 shares of Invesco Limited Term Municipal Income Fund. This is insufficient to accommodate the number of shares to be distributed to Plaintiffs (29,767.05 shares). The 11,468 should be conveyed to Plaintiffs, and Shirley must substitute an asset held in RJ Account 061 that is equal in value to account for the 18,299.05 shares that would otherwise be transferred to Plaintiffs.

Black Rock Multi Asset Income Portfolio Fund, Class A	BAICX (now BIICX)	36,073	16,232 .85	
Franklin High Yield Tax Free Income Fund, Class A	FRHIX (now FHYV X)	20,928	9,417. 6	
MFS Municipal Limited Maturity Fund, Class A	MTLF X	28,080	12,636	
MFS Arkansas Municipal Bond Fund, Class A	MFAR X (now MARL X)	146,293	65,831 .85	
MFS Municipal High Income Fund, Class I	MMH YX (now MMII X)	87,823	39,520 .35	
T. Rowe Price Media and Telecommunic ation s Fund	PRMT X	11,194	5037.3	
Prudential Municipal High Income Fund, Class A	PRHA X (now PHIZX)	76,309	34,339 .05	

Wells Fargo Strategic Municipal Bond Fund, Class A	VMPAX (now STRIX)	67,920	30,564	
SPDR Gold TR SHS	GLD	2,000	900	
Intel Corporation	INTC	12,400		$ 239,658.25
Procter and Gamble	PG	3,120		$ 121,416.11
Tesla Incorporated	TSLA	700		$ 95,193.98
J.P. Morgan Municipal Money Market Fund	JMAXX	455,806.9		$ 200,035.71
Invesco Charter Fund, Class A	CHTRX	43,952		$ 373,011.21
American Balanced Fund, Class A	ABALX	22,874		$ 280,587.73
Artisan Mid Cap Value Fund, Investor Class	ARTQX	21,193		$ 237,886.14
Black Rock Global Allocation Fund, Class A	MDLOX	15,423		$ 142,740.04

Growth Fund of America, Class F1	GFAFX	8,154		$ 185,248.08
Capital World Growth & Income Fund	CWGFX (now WGIFX)	6,431		$ 146,144.06
Hartford Mid Cap Fund, Class A	HFMCX	22,453		$ 340,206.15
Highland Floating Rate Opportunities Fund, Class A	HFRAX	33,328		$ 164,074.37
Perkins Mid Cap Value Fund, Class A	JDPAX	58,817		$ 477,451.51
Lord Abbett Value Opportunities Fund, Class A	LVOAX	36,470		$ 352,949.25
PIMCO Global Multi Asset Fund, Class A	PGMAX	21,093		$ 126,370.83
Pioneer Classic Balanced Fund, Class A	AOBLX	80,771		$ 364,958.90

Prudential Jennison Small Company Fund Inc., Class A	PGOAX	64,697		$ 880,316.38
Ishares Silver Trust	SLV	15,000		$ 103,971.27
Grand River Dam Authority Oklahoma Revenue Bonds, Series 2008 A (386442TE7) ($100,000 par value)				$ 45,000.00

V. CONCLUSION

For the reasons explained above, the assets Dude owned individually, as set forth in Table 1, are subject to the Court's constructive trust for the Plaintiffs' benefit; however, since those assets are to pass through probate, Shirley is ordered to deliver them to the Administrator of Dude's estate for further disposition and transfer in the Circuit Court of Sebastian County, Arkansas. She must do so within 30 days.

The jointly held assets listed in Tables 2–5 are also subject to the constructive trust, but they will not pass through probate; accordingly, Shirley is ordered to

convey and deliver Plaintiffs' share of those assets to Plaintiffs. She must do so within 30 days.

IT IS SO ORDERED on this 18th day of January, 2022.

/s/ Timothy L. Brooks
TIMOTHY L. BROOKS
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

CASE NO. 2:20-CV-2038

[Filed January 18, 2022]

LISA CRAIN; CATHEE CRAIN; MARILLYN CRAIN BRODY; and KRISTAN SNELL PLAINTIFFS	)
V.	)
SHIRLEY CRAIN and RAY FULMER, as Representative of the Estate of H.C. "Dude" Crain, Jr., Deceased DEFENDANTS	)

JUDGMENT

For the reasons set forth in the Court's May 24, 2021, ruling on Summary Judgment (Doc. 147) and the Amended Memorandum Opinion and Order filed this day (Doc. 203) ("the Order"), **IT IS HEREBY ORDERED AND ADJUDGED** that the assets set forth in today's Order are impressed with a constructive trust for the Plaintiffs' benefit and are to be disposed as follows: Within 30 days of today's date, Defendant Shirley Crain is to deliver the assets in

Table 1 of the Order to the Administrator of the Estate of H.C. "Dude" Crain, Jr., and the assets in Tables 2–5 of the Order to Plaintiffs.

IT IS SO ORDERED AND ADJUDGED on this 18th day of January, 2022.

/s/ Timothy L. Brooks
TIMOTHY L. BROOKS
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

CASE NO. 2:20-CV-2038

[Filed July 8, 2021]

LISA CRAIN; CATHEE CRAIN; MARILLYN CRAIN BRODY; and KRISTAN SNELL PLAINTIFFS V. SHIRLEY CRAIN; BRIAN POPE; and RAY FULMER, as Representative of the Estate of H.C. "Dude" Crain, Jr., Deceased DEFENDANTS	)

OPINION AND ORDER

Now pending is Defendants Shirley Crain and Brian Pope's Motion for Clarification or Modification (Doc. 154) of the Court's Memorandum Opinion and Order on summary judgment (Doc. 147). Plaintiffs filed a Response in Opposition to the Motion (Doc. 158), which the Court also considered.

For the reasons stated in its Opinion and Order, the Court found Dude in breach of contract, granted partial

summary judgment on the issue of liability, and ordered specific performance as a remedy. To effectuate this remedy, the Court explained why a constructive trust would be imposed on "half the property Dude owned and controlled up to the moment of his death, (as well as any post death interest, earnings, or proceeds), with the value of such to be determined at trial." (Doc. 147, p. 17).

The Court's ruling was limited to liability and the resulting remedy, with the scope of the constructive trust categorically described to match the scope of Dude's contractual obligation. Summary judgement was not sought or granted on the issue of specific assets to be impressed by the trust, as that issue was expressly reserved for trial. In fact, Plaintiffs stipulated during the hearing that "there are disputed questions of fact about exactly what assets [Dude] did own and control at the time of his death and what their value is."[1]

Now comes the Defendants' Motion that, despite its title, does not directly ask the Court for reconsideration of any portion of the summary judgment order pursuant to Federal Rule of Civil Procedure 60.[2]

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[1] An official transcript of the summary judgment hearing has not yet been requested or filed of record. Quoted references to the hearing are taken from the Court's real-time transcript.

[2] Grounds for relief from a judgment include mistake, inadvertence, surprise, newly discovered evidence, fraud, misconduct by an opposing party, or any other reason that justifies relief. Fed. R. Civ. P. 60(b). Defendants' Motion does not list any of these grounds. Instead, the Motion suggests more broadly that the

Instead, the Defendants contend that the Court's summary judgment ruling "raises questions that these Defendants seek to clarify." But on the way to explaining what they find confusing, Defendants mischaracterize the summary judgment record, seek clarity on defenses they never raised, misconstrue applicable law, and misunderstand the difference between a remedy and a cause of action.

For example, the Defendants claim that the Court "has not received evidence on what properties should be impressed under constructive trust." (Doc. 155, p. 2). In fact, the Court received extensive evidence regarding many of the assets at issue, including uncontested exhibits to the motions, statements of undisputed facts, and admissions, agreements, and concessions within the summary judgment briefing and during the half-day hearing the Court held on May 5, 2021.[3]

Court may "clarify or correct a decision (or a portion thereof)" under Rule 60(a) when there is an error in the judgment. (Doc. 155, p. 2). Defendants point to no errors in the Court's judgment, either with respect to any material fact or issue of law.

[3] More specifically, the parties agree that Dude's separate property (to pass through probate) includes Dude's interest in four companies (Premier Foam, Dude, Inc., Airport Transport, and Regional Jet Center) and various other items of personal property that are yet to be inventoried of record by Ray Fulmer in the state court probate action. The Court was also presented with undisputed facts and admissions regarding assets that Dude owned jointly with Shirley (which passed outside probate by operation of law upon Dude's death), including a Raymond James investment account held jointly with right of survivorship, as well as multiple real properties held as tenants by the entirety. It is true that the Court reserved for trial the task of identifying

For another example, Defendants seek to clarify the status of their statute-of-limitations defense—which they did not raise in support of their own motion for summary judgment, much less did they assert it as a defense when responding to Plaintiffs' motion for partial summary judgment. Nevertheless, Defendants now argue that Plaintiffs are time-barred from seeking the *remedy* of a constructive trust, seemingly ignoring that Plaintiffs sole *cause of action* is one for breach of contract. (Doc. 38). Statutes of limitations are measured against the accrual of the cause of action, not the resulting remedy. Defendants fail to explain why or how the statute has expired on Plaintiffs' breach of contract claim. There is simply no validity to the argument that *the Court* would be time-barred from imposing a constructive trust as a remedy for breach of contract.

The Motion is therefore quite oddly postured. Defendants seek clarity in the absence of vagueness or a modification without identifying a premise in law or fact. To be sure, the Court will not grant these Defendants a "do-over" of the summary judgment phase of these proceedings, that ship has sailed. The Court is intimately familiar with the arguments that were raised on summary judgment and has thoroughly reviewed the real-time transcript of the hearing and its

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specific assets that Dude owned and controlled. It is also true that proof will be necessary to resolve peripheral issues regarding how to quantify Dude's interests in certain assets and whether/how to value certain assets. But it is grossly inaccurate for Defendants to suggest that there were insufficient undisputed facts to support the Court's summary judgment ruling.

summary judgment order. Upon review, the Court finds that its order requires neither clarification nor modification. To that extent, the Motion (Doc. 154) is **DENIED**. Nevertheless, to the extent that Defendants are simply seeking to refine the scope of the remaining disputed issues reserved for trial, for the purpose of assisting the parties in their presentation of relevant evidence, that is fair. The Court offers *liminal* rulings on the following select issues raised or suggested by Defendants' Motion.

1. Constructive Trust Is an Appropriate Remedy

As the Court previously held, Plaintiffs are entitled to summary judgment on their breach-of-contract claim. *See* Doc. 147, p. 16. The Court explained that specific performance is the remedy for breach of contract in this case. However, specific performance of the contract at issue here—where the breaching party passed away, and the assets that were the subject matter of the contract were devised by will to other heirs or distributed to other parties by operation of law several years ago—requires the use of a constructive trust to eventually reunite legal ownership with equitable and/or beneficial ownership. As the Arkansas Supreme Court explained, "A constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." *Cox v. Miller*, 210 S.W.3d 842, 848 (Ark. 2005). It is not necessary to prove fraud to obtain a constructive trust. *See id.* Rather, the "wrongful disposition of another's property" will create

a "duty to convey the property" by means of a constructive trust "without regard to the intention of the person who transferred the property." *Id.* at 849.

Professor Brill's seminal treatise explains that a constructive trust is a proper remedy for the court to impose "when equity demands that in light of all the circumstances the legal title and beneficial interest should be separated." Howard W. Brill & Christian H. Brill, 1 *Ark. Law of Damages* § 20.5 (6th ed.). "The court [may decree] that the trustee is holding the property for the beneficiary. At some point, subject to judicial control and oversight, the legal title to the property will also pass from the trustee to the beneficiary, uniting both the beneficial (or equitable) title and the legal title." *Id.* This is the remedy sought and granted to the Plaintiffs based on the undisputed facts in the summary judgment record. Decedent H.C. "Dude" Crain, Jr., breached a contract to make a will. Evidence was presented on summary judgment that Dude's wife, Shirley, received property by operation of law at Dude's death in violation of Dude's contractual obligations. And she was devised a present and unrestricted interest to assets passing by will to the marital trust, in plain violation of the property settlement agreement ("PSA"). The factual findings of liability on partial summary judgment are beyond "clear, cogent, and convincing"—they are undisputed. And Shirley has been, and will be, unjustly enriched in the absence of a constructive trust. For "the sweep of unjust enrichment is broad enough so that a constructive trust may also be imposed against an innocent party, provided that the innocent party would be unjustly enriched vis-a-vis the plaintiff." *Id.*

Professor Brill offers an example that is directly analogous to the facts here:

> [W]hen a husband ignored the terms of a divorce decree and did not maintain life insurance on himself payable to a minor child, the minor child was permitted to recover the proceeds of the policy, even though the named beneficiary in the policy at the time of his death was the second wife. Although the second wife was innocent, she would be unjustly enriched by retaining the funds. Similarly, the creativity and flexibility of equity even permits the creation of a partial constructive trust.

Id.

In the instant matter, Dude's daughters—the Plaintiffs—were supposed to inherit half of his estate pursuant to a contract Dude entered into before his marriage to Shirley. Dude did not live up to his obligations under the contract. Although Shirley is innocent in all of this—after all, no one is alleging that she defrauded the Plaintiffs—she will nevertheless be unjustly enriched if she is permitted to retain 100% of the assets of Dude's estate. A constructive trust "on half the property Dude owned and controlled up to the moment of his death, (as well as any post-death interest, earnings, or proceeds)" is the appropriate equitable remedy for Dude's breach of contract. (Doc. 147, p. 17). The identity and value of specific assets meeting that definition are disputed and remain for trial.

2. Burden of Proof and Scope of Trial

Defendants seek to clarify that it will be Plaintiffs' burden to prove which assets are to be placed in constructive trust. That is correct. But, for the reasons explained in footnote 3 above, the Court's present understanding (subject to the proof at trial) is that asset tracing is not likely to be required here because the parties largely (although not completely) agree on the universe of assets that might meet the Court's definition of assets subject to the constructive trust.

Defendants also note that "many of the properties at issue are real estate assets acquired during Dude and Shirley's marriage and titled in their names jointly, as husband and wife, or by the entireties." (Doc. 155, p. 3). That is also correct—and that is the crux of the Court's summary judgment holding. Dude did not successfully avoid his contractual obligations by merely titling his property to pass directly to Shirley by operation of law. *See* Brill, *supra*, § 20.5. *All* the property that Dude owned and controlled up until the moment of his death will be considered for inclusion in the constructive trust, including property he jointly owned with Shirley. The main purpose of the trial is for the Court to hear evidence as to the nature and character of the disputed property. If Defendants contend that Dude was not a legal and beneficial owner of certain disputed property, then Defendants are free to present such evidence at trial.

3. Dude's "Proportional Interest" in Assets

Defendants argue that the only property that should be considered for inclusion in the constructive

trust is Dude's separate property and the "proportional interest in the assets he jointly owned with Shirley at the time of his death." (Doc. 155, pp. 5–6). They contend that the most Dude owned and controlled with respect to property titled jointly with Shirley was *half* the property—so the most Plaintiffs can inherit is *one quarter* of that property. This proposition is not necessarily correct. "[A] presumption arises that a tenancy by the entirety is created when a husband and wife acquire property in both of their names." *Cloud v. Brandt*, 259 S.W.3d 439, 444 (Ark. 2007). Defendants give an example in their briefing of Dude and Shirley owning "Blackacre as tenants in common, without survivorship rights," but that is not the Court's understanding of the factual scenario here. To the extent that Dude and Shirley owned property as tenants in common, that evidence is highly relevant and should be presented at trial.

"Tenancy by the entirety is a joint tenancy modified by the common law doctrine that husband and wife are one person in law, and cannot take by moieties." *Parrish v. Parrish,* 235 S.W. 792, 794 (Ark. 1921). "Thus neither spouse owns an undivided one-half interest in any entirety property—the entire entirety estate is vested and held in each spouse." *Wood v. Wright,* 386 S.W.2d 248, 251 (1965). "[A] tenancy by the entirety can exist in personal property, as well as real property." *Cloud*, 259 S.W.3d at 329. Because of the unique character of this property, "one spouse can reduce the amount of a tenancy by the entirety by withdrawing funds from a joint account and reducing them to his or her separate possession and, absent another claim for relief, the surviving spouse is only

entitled to the remaining balance in the joint account." *Id.* at 330.

To put a finer point on it, the Court understands from the summary judgment record that the Raymond James account Dude owned jointly with Shirley during his lifetime was held in a tenancy with survivorship rights. Because Dude had the legal right to deplete 100% of that account during his lifetime without Shirley's express authorization, he owned and controlled 100% of that account for purposes of determining how much of it will go in the constructive trust.

With all of that said, Shirley is free to present evidence at trial regarding any asset in dispute to which she claims to have a legal, equitable, or beneficial interest. For example, Shirley will be permitted to present proof at trial that some portion of the Raymond James account should be considered her sole property, in light of the equities. Professor Brill offers a potential example: a couple who "cohabited for 26 years and operated separate businesses from a single location owned by the man." Brill, *supra*, § 20.5. The woman convinced a court to impose a constructive trust in her favor on a percentage of the real property after she presented proof of "her contribution of funds to the mortgage payments, and her belief that the property was titled jointly." *Id.* The Court similarly will entertain proof that Shirley or her son has an equitable or beneficial interest in Dude's disputed property. Also, Shirley may present proof that some of the property Plaintiffs identified was gifted to her by Dude during his lifetime.

4. Trusts and Inter Vivos Gifts to the Plaintiffs

Defendants' Motion also asks if the constructive trust will include property that Dude "owned or controlled" as trustee.[4] (Doc. 155, p. 6). The answer is "no." A trustee is merely a fiduciary. If Dude was a trustee of certain property, then he did not own it (unless he was also the beneficiary); he had "an equitable obligation to keep or use [it] . . . for the benefit of another." *Kidwell v. Rhew*, 268 S.W.3d. 309, 312 (Ark. 2007).

Next, Defendants maintain that the matter of inter vivos gifts "was not at issue in the MSJ papers," so "evidence of significant inter vivos gifts that Dude and Shirley provided the Plaintiffs, as an offset to [their] claims," should be allowed at trial. (Doc. 155, p. 6). This is another false characterization of the summary judgment record. Dude's inter vivos gifts to his daughters were extensively discussed in the summary judgment briefing and during the motion hearing on May 5. During the hearing, the Court asked Plaintiffs' attorney whether any inter vivos gifts made by Dude to Shirley, her son, or any of the Plaintiffs should be

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[4] Defendants repeatedly misquote the Court's summary judgment order in arguing that Dude's estate may include property he controlled—but did not also own. The order clearly states that the property subject to the constructive trust is that which Dude "owned *and* controlled." (Doc. 147, p. 17) (emphasis added). The distinction is potentially important. For one example, a fiduciary or a person in a closely held relationship can have signing privileges on a deposit account, but being an authorized signer on an account is not necessarily determinative of beneficial ownership of funds on deposit.

considered for inclusion in the constructive trust, and counsel responded in the negative. Shirley's attorney was then asked by the Court whether he agreed that the subject of inter vivos gifts was not relevant to the issues in the case—and counsel also agreed.[5]

Obviously, gifts that Dude made to others during his lifetime were not owned and controlled by him just before his death. Beyond the general issue of gifts described above, the Court acknowledges that there is a specific dispute over "whether Plaintiffs already received part of their inheritance under the will when their father gifted them with cash in December of 2012." (Doc. 147, p. 10). The Court agrees with the Plaintiffs as to the applicable legal standard: For a "gift" to be applied towards satisfaction of Dude's obligation under the PSA, reference to such obligation must be tied to the transaction, otherwise it is merely a gift which does not reduce the balance of the obligation. *See* 95 C.J.S. *Wills* § 137. The parties should be prepared to present evidence about the December 2012 gifts (or other similar "gifts" through the years) so that the Court may determine whether these particular gifts should offset Plaintiffs' inheritance. A potential

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[5] The colloquy between the Court and Shirley's counsel on inter vivos gifts was as follows:

> **THE COURT:** So I think the record will reflect that [Plaintiffs' counsel], with the exception of these two issues, has now said that gifts that were made during Dude's lifetime are not required to go back into the pot for purposes of applying the 50 percent. And you would agree with that?
>
> **SHIRLEY'S COUNSEL**: Yes.

dispute also exists with regard to monies transferred to Brian Pope. As explained during the hearing, there may be a dispute (subject to proof at trial) as to whether such transfers were gifts or loans (with repayment obligations to the decedent's probate estate). Any other evidence of Dude's inter vivos gifts to Plaintiffs is likely irrelevant and subject to objection and exclusion from trial.

5. Valuation of Assets by the Court

Defendants' last point of clarification asks whether "the Court intends to value the assets purportedly subject to constructive trust, or merely identify them." (Doc. 155, p. 7). This is a fair point for clarification. The Court's order used the term "value" in describing issues remaining for trial. In context, the term value may be interchangeable with the notion of identifying assets subject to the constructive trust. Assets such as the investment accounts can easily be marked to market value on various dates. Other assets, such as real property or on-going business interests are not so easily valued and may require expert opinion. The Court notes that the parties described a number of specific assets in their summary judgment briefing and assigned certain dollar values to those assets. It is therefore quite likely that the trial will include proof of the value of certain assets, and the Court will entertain such proof. By the same token, the Court is aware that a probate case is pending in Sebastian County, Arkansas, regarding Dude's estate. Depending on the proof at trial, the Court may need to resolve disputes of fact as to whether particular assets are subject to the constructive trust and the values of such assets.

Alternatively, it may be that the Court can simply enter an order imposing a constructive trust on one-half of Dude's probate estate. The Court cannot reach this decision in advance of the proof at trial. In any event, it will ultimately be up to the probate court to administer, settle, and distribute the property to Dude's heirs, including the property this Court directs to be held in constructive trust for the Plaintiffs. Although federal courts lack authority to probate a will, they certainly have the power "to entertain suits in favor of creditors, legatees and heirs and other claimants against a decedent's estate to establish their claims . . . ." *Marshall v. Marshall*, 547 U.S. 293, 296 (2003) (internal quotation marks omitted). There is no dispute that the instant lawsuit is fully within the federal jurisdiction of this Court.

Defendants specifically ask the Court not to "value the assets purportedly subject to a constructive trust." (Doc., 155, p. 8). It will be difficult, if not impossible, for the parties to discuss certain assets at trial without at the same time discussing their values—particularly if Shirley wishes to present proof as to her equitable share of certain assets. Likewise, the Court does not believe it would exceed its authority by making certain findings regarding the valuation of property in Dude's probate estate, particularly if the parties agreed to the values or if the values were not materially in dispute. At a minimum, the Court will need to make fact finding sufficient to identify and describe (specifically or categorically) the property contained in Dude's estate, for the purpose of impressing a constructive trust on half of his assets, many of which will pass through probate.

IT IS SO ORDERED on this 8th day of July, 2021. **IT IS FURTHER ORDERED** that Defendants' Joint Motion for Leave to File an Enlarged Reply Brief (Doc. 163) is now **DENIED AS MOOT**.[6]

/s/ Timothy L. Brooks
TIMOTHY L. BROOKS
UNITED STATES DISTRICT JUDGE

[6] On the record here, a reply brief would not be helpful. As the Court noted previously, the Motion for Clarification or Modification was oddly postured and contained various inaccurate references to the summary judgment record, not to mention mischaracterizations of the law as applied to the undisputed facts here. Further, the Court determined that its summary judgment order required neither clarification nor modification, and thus a reply brief from Defendants would not have assisted the Court in coming to some other conclusion.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

CASE NO. 2:20-CV-2038

[Filed May 24, 2021]

LISA CRAIN; CATHEE CRAIN; MARILLYN CRAIN BRODY; and KRISTAN SNELL PLAINTIFFS	)
V.	)
SHIRLEY CRAIN; BRIAN POPE; and RAY FULMER, as Representative of the Estate of H.C. "Dude" Crain, Jr., Deceased DEFENDANTS	)

MEMORANDUM OPINION AND ORDER

Before the Court are a Motion for Summary Judgment (Doc. 89) filed by Separate Defendant Shirley Crain ("Shirley") and a Motion for Partial Summary Judgment filed by Plaintiffs Cathee Crain, Lisa Crain, Marillyn Crain Brody, and Kristan Snell

(Doc. 101).[1] For the following reasons, Shirley's Motion is **DENIED,** and the Plaintiffs' Motion is **GRANTED**.

I. BACKGROUND

The issues in this case stem from a property settlement agreement (the "PSA") executed by the Plaintiffs' parents, H.C. "Dude" Crain and Marillyn Crain. (Doc. 38-2). Dude and Marillyn were married on May 1, 1954, and they separated in 1976. The Plaintiffs are the only children of the marriage. Dude filed for divorce from Marillyn on September 20, 1988, and on June 22, 1989, they executed the PSA. Dude married Shirley a few months later, on November 1, 1989.

According to the unambiguous language of the PSA,[2] Dude and Marillyn entered into the agreement

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[1] The other documents considered by the Court include: Shirley's Memorandum in Support (Doc. 90); Shirley's Statement of Undisputed Material Facts (Doc. 91); Shirley's Supplemental Brief (Doc. 95); Shirley's Supplemental Statement of Facts (Doc. 96); Plaintiffs' Combined Brief in Support of their Motion and in Opposition to Shirley's Motion (Doc. 102); Plaintiffs' Response to Shirley's Statement of Facts (Doc. 103); Shirley's Reply (Doc. 115); Separate Defendant Brian Pope's Response in Opposition to Plaintiffs' Motion (Doc. 118); Mr. Pope's Response to Plaintiffs' Counterstatement of Facts (Doc. 119); Shirley's Response in Opposition to Plaintiffs' Motion (Doc. 121); Shirley's Brief in Opposition to Plaintiffs' Motion (Doc. 122); Shirley's Response to Plaintiffs' Counterstatement of Facts (Doc. 124); Plaintiffs' Reply (Doc. 132); and Shirley's Supplement (Doc. 140). The Court also held a hearing on the motions on May 5, 2021, and entertained oral argument from counsel at that time.

[2] The parties agree that the PSA is unambiguous, and the Court concurs.

to "fully and finally settle, resolve and terminate any and all claims, demands and rights of whatever kind or nature between" them. *Id.* at p. 7, ¶ 9. They were represented by separate counsel and gave informed consent to all terms contained in the PSA. *Id.* at p. 8, ¶ 10. Paragraph 1 explains the couple's agreement as to the division of real and personal marital property. Marillyn agreed to receive a house in Fort Smith, Arkansas (subject to any indebtedness), all household furnishings and appliances located in that house, all bank accounts in her name, all separate property she inherited from her mother, a one-time cash payment of $250,000, and an annuity in the amount of $1.5 million, payable to her in monthly installments over fifteen years. All other real, personal, and mixed marital property became Dude's. *Id.* at p. 5, ¶ 1.[3]

As part of the couple's agreement concerning the division of their marital property, they also considered how their children would be impacted financially by their divorce. To that end, Dude and Marillyn made mutual promises to engage in estate planning to "maintain" a will leaving at least half of their respective estates to their daughters. PSA Paragraph 3,

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[3] To put in perspective the comparative value of the marital property that Dude and Marillyn received through the PSA, it is undisputed that the couple owned a lucrative business called Crain Industries during their marriage. Marillyn received zero interest in Crain Industries through the PSA, though that business was reportedly earning annual revenues of $154 million in 1990, the year after the PSA was signed. (Doc. 124, p. 6). According to the Plaintiffs' affidavits, Dude sold Crain Industries for approximately $130 million in 1995. (Doc. 104-5 to 104-8). Defendants dispute the alleged sales price. (Doc. 125, p. 7).

which the Court will refer to as the "will provision," states:

> In further consideration of the covenants and agreements contained herein, husband and wife agree to maintain in full force and affect [sic] a valid Last Will and Testament whereby each will leave at least one-half of their estate to the four daughters of this marriage, Lisa . . .; Cathee . . .; Marillyn . . .; and Kristan . . ., per stirpes."

Id. at p. 6. The Chancery Court of Logan County, Arkansas, stated in a written order dated June 22, 1989, that it had "examined the Property Settlement Agreement between the parties" and found "that said agreement is contractual and nonmodifiable." *Id.* at p. 2, ¶ 5.

Marillyn died in 2006. The Plaintiffs were the only heirs of her estate, which was valued at the time of her death at approximately $1.5 million. In accordance with her will (Doc. 91-4), all the assets Marillyn owned, with the exception of some designated personal items, were divided equally among her four daughters, *per stirpes*. *Id.* at § 4.2. Each daughter's share was divided between two trusts: one containing assets not subject to estate tax (i.e., assets valued up to the amount of the lifetime gift and estate tax exemption), and the other containing assets subject to taxation. Each daughter was named the sole, direct beneficiary and sole trustee of her two trusts. The will also empowered each daughter to immediately distribute to herself "so much of the income and principal of the property [in her trusts] required to provide for [her] maintenance,

health, education and support in reasonable comfort." *Id.* at § 5.4.

Dude, on the other hand, wrote a will in 1993 that left nothing to his daughters and everything to his second wife, Shirley. *See* Doc. 104-1. Nearly two decades later, he engaged an attorney to draw up a new will. This document, which was signed on April 30, 2012, (Doc. 38-3, pp. 5–28), purported to leave all of Dude's ownership interest in his household furnishings, automobiles, and personal effects to Shirley and divided his residual estate among two trusts: the Bypass Trust and the Marital Deduction Trust.[4] The Bypass Trust was to include only those assets that could pass free of estate taxes (i.e., an amount equal to Dude's gift and estate tax exemption) "after taking into account all other lifetime and testamentary dispositions by [Dude] and the actions of [his] executor in making certain tax elections." *Id.* at § 2.2.A(a). The direct beneficiaries of the Bypass Trust were the four Plaintiffs and Separate Defendant Brian Pope, Shirley's son from a previous marriage. Under the 2012 will, they were each entitled to receive an equal share of the assets in the Bypass Trust, *id.* at § 2.4, and Shirley was to serve as the trustee. *Id.* at § 1.3. The rest of Dude's estate was to fund the Marital Deduction Trust. Dude specified that this trust would be "for the exclusive benefit of [his] wife," Shirley. *Id.*

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[4] To be clear, the property mentioned in the will was only a fraction of Dude's assets. The vast majority of the assets he enjoyed and controlled during the last two decades of his life were jointly owned with Shirley, either in tenancies by the entirety or in joint tenancies with right of survivorship.

at § 2.3.B. Shirley was to be the direct beneficiary and the sole trustee of the Marital Deduction Trust. Once that trust was funded, she would have the discretion to pay herself "annually or more frequently all of the net income," *id.* at § 2.3.C, and "so much or all of the principal . . . as [she] may direct from time to time." *Id.* at § 2.3.D. Only upon Shirley's death would the Marital Deduction Trust terminate, with any remaining balance divided equally among the Plaintiffs and Mr. Pope as remainder beneficiaries. *Id.* at § 2.3.E. Dude's 2012 will did not obligate Shirley to leave the Plaintiffs anything by and through the Marital Deduction Trust.

On May 21, 2012, approximately a month after Dude signed the 2012 will, he executed a codicil to that will. *See* Doc. 38-3, pp. 29–32. The codicil's only function was to further limit the Plaintiffs' (and Mr. Pope's) ability to inherit under the will. Before the codicil was executed, the will had specified that the Plaintiffs and Mr. Pope would inherit under both trusts *per stirpes*, but the codicil modified §§ 2.3E and 2.4 of the will to eliminate *per stirpes* inheritance. *See* Doc. 38-3, pp. 29–30.

At the end of 2012, Dude and Shirley gave the Plaintiffs and Mr. Pope Christmas gifts of $1.648 million each. (Doc. 91, p. 3). Dude and Shirley represented to the Plaintiffs in writing that half of each gift satisfied Dude's lifetime gift and estate tax exemption with respect to each Plaintiff. Shirley contends that when Dude died on April 15, 2017, "all or almost all amounts that could have gone into the Bypass Trust to the Plaintiffs and Pope" were depleted by the December 2012 gifts. *Id.* During a hearing on

the summary judgment motions on May 5, 2021, Shirley's counsel clarified that if the 2012 will were probated, there would be no assets available to pass into the Bypass Trust by virtue of Dude's "pre-death bequest" to his daughters (and Mr. Pope) during Christmas of 2012. The Plaintiffs dispute that the Christmas gifts should be credited toward the amount they contend they are owed under the PSA.

Shirley never initiated a probate action after Dude died. Instead, nearly three years later, on March 19, 2020, the Plaintiffs filed a petition to open a probate proceeding in the Circuit Court of Sebastian County, Arkansas, and that court appointed Separate Defendant Ray Fulmer to serve as executor of Dude's estate. Shirley initially represented to the probate court that Dude's operable will was the one he executed in 1993, but she later corrected this error and disclosed the superseding will and codicil executed in 2012. It appears the Plaintiffs were aware at the time they filed the probate action that Dude had made an agreement with their mother to leave them one-half of his estate, and they initiated the probate action in the hope of receiving their inheritance. On March 27, 2020, they filed the instant lawsuit, asking this Court to find that Dude breached the PSA and requesting that a constructive trust be impressed on one-half of Dude's property that should have passed through his will.

Shirley believes that the 2012 will is valid and that Dude intended to leave at least half his estate to the Plaintiffs through that instrument. First, Shirley contends that Dude made pre-death bequests to the Plaintiffs in December of 2012 which collectively would

have funded 80% of the Bypass Trust. Second, she argues that the will entitles the Plaintiffs to collectively inherit 80% of the assets that would fund the Marital Deduction Trust—once Shirley dies. In her view, the money the Plaintiffs would receive through the 2012 will would equal at least one-half of Dude's estate—if "estate" were defined as Dude's *probate* estate, i.e., the property he separately owned at the time of his death.

The Plaintiffs respond to these arguments with two of their own. First, they assert that Dude breached the PSA because the 2012 will does not purport to leave them at least half of his estate—even if "estate" were limited to Dude's probate estate. Further, if the Court were to assume that the 2012 Christmas gifts should be credited toward the Plaintiffs' inheritance, they point out that those gifts, collectively, do not equate to half of Dude's probate estate.[5] The Plaintiffs also maintain that any interest they might have in the Marital Deduction Trust as remainder beneficiaries is illusory, as Shirley is the sole trustee and sole direct beneficiary of that trust and is empowered to deplete as much of the principal as she likes during her lifetime.[6]

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[5] The Plaintiffs' expert has valued the Marital Deduction Trust's assets at approximately $12 million. Shirley disagrees with that valuation. Her counsel was asked during the hearing to estimate the value of the assets, and he asserted that they were worth closer to $10 million.

[6] Shirley disagrees with that characterization. At the motion hearing, her counsel described the Plaintiffs' likelihood of inheriting under the Marital Deduction Trust as "speculative," but not illusory.

Second, the Plaintiffs argue that Dude failed to engage in estate planning that would result in them receiving at least half of his estate, in violation of the PSA. In the Plaintiffs' view, Dude breached the promise he made to their mother by shielding from probate the lion's share of the assets he enjoyed and controlled during his lifetime—which the parties confirmed during the hearing are valued at approximately $100 million today. He owned those assets in either tenancies by the entirety or joint tenancies with right of survivorship with his wife, Shirley. This meant that the assets were his to control until the moment of his death, but at death they passed outside of probate to Shirley by operation of law.[7] The Plaintiffs believe the purpose of the will provision of the PSA will be entirely frustrated if Dude's estate is defined to exclude the property he owned jointly with Shirley. They therefore ask the Court to find that Dude breached the PSA and to impress a constructive trust over half the assets he owned or controlled up until the moment of his death, regardless of how that property passed by operation of law after his death.

Under Arkansas law, a contract to make a will is enforceable if there is "[a] writing signed by the decedent evidencing the contract." Ark. Code Ann. § 28-

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[7] To illustrate the point, the Plaintiffs refer to an investment account that Dude owned jointly with Shirley during his lifetime and which is now valued at around $95 million. When Dude was alive, the contingent beneficiaries of that account were the Plaintiffs and Mr. Pope, in equal shares. (Doc. 104-14, p. 1). When Dude died, Shirley became the sole owner of the account by operation of law, and she removed the Plaintiffs as beneficiaries and left her son as the sole beneficiary. *Id.* at p. 3.

24-101(b)(1)(C). In the case at bar, the Court has been presented with such a writing—the PSA—signed by Dude and evidencing an agreement he made with Marillyn to make a will for the benefit of their four daughters. As part of the equitable remedy of divorce, the Chancery Court declared the PSA (including its will provision) to be "contractual and non-modifiable." All parties to the instant dispute agree that the PSA is valid, enforceable, and unambiguous in its terms. The parties also agree that the Court is in possession of all the facts needed to decide whether Dude breached the will provision of the PSA. To make a finding of breach, the Court need only analyze the bequests Dude made to his daughters in his 2012 will and then determine whether those bequests satisfy the plain terms of the PSA.

Though Shirley and Mr. Pope take the position that the 2012 will satisfies the PSA, their argument is untenable on its face, as the discussion below will make clear. Plaintiffs argue that if the Court finds that Dude breached the PSA, the appropriate remedy is specific performance—and the Court agrees. Specific performance of the contract here would involve impressing a constructive trust on Dude's assets. But which assets? The parties vigorously dispute this question, which goes to the nature and scope of the constructive trust. Below, the Court will begin its analysis by considering the legal standard that applies when deciding cross-motions for summary judgment. Next, the Court will examine whether the bequests to the Plaintiffs in Dude's 2012 will are sufficient to satisfy the will provision of the PSA. After that, the Court will construe what Dude and Marillyn intended

by the term "estate" in the PSA's will provision. And finally, the Court will analyze the scope of the constructive trust that must be impressed upon Dude's assets.

II. LEGAL STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When, as here, cross-motions for summary judgment are filed, each motion should be reviewed in its own right, with each side "entitled to the benefit of all inferences favorable to them which might reasonably be drawn from the record." *Wermager v. Cormorant Twp. Bd.*, 716 F.2d 1211, 1214 (8th Cir. 1983). The Court must view the facts in the light most favorable to the non-moving party and give the non-moving party the benefit of any logical inference that can be drawn from the facts. *Canada v. Union Elec. Co.*, 135 F.3d 1211, 1212-13 (8th Cir. 1997). The moving party bears the burden of proving the absence of any material factual disputes. Fed. R. Civ. P. 56(a); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986).

If the moving party meets this burden, then the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (quoting then-Fed. R. Civ. P. 56(e)) (emphasis removed). These facts must be "such that a reasonable jury could return a verdict for the nonmoving party." *Allison v. Flexway Trucking,*

Inc., 28 F.3d 64, 66 (8th Cir. 1994) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

III. DISCUSSION

A. 2012 Will and Codicil

Shirley contends that Dude satisfied his promise under the PSA to "leave at least one-half of [his] estate to the four daughters . . . per stirpes" when he executed his 2012 will and codicil. (Doc. 38-2, p. 6, ¶ 3). The Court disagrees. The PSA explicitly requires that Plaintiffs inherit *per stirpes*, but the codicil to the will eliminates the possibility of *per stirpes* inheritance—a fact Shirley's counsel admitted during the summary judgment hearing. Counsel suggested that this particular breach of the PSA's requirements could be corrected by rescinding the codicil; but the Court believes doing this will not be enough to cure the breach. The 2012 will does not provide a mechanism by which Plaintiffs will inherit at least one-half of Dude's estate, and this is true even if "estate" is defined to mean only the property Dude separately owned upon his death and contemplated passing to his heirs through probate.

The will envisions the property that Dude separately owned at death being deposited into the Bypass Trust and/or the Marital Deduction Trust. The parties agree that if the will were to be probated today, no assets would flow to the Bypass Trust. There remains a live dispute about whether Plaintiffs already received part of their inheritance under the will when their father gifted them with cash in December of 2012; however, there is no dispute that this gift totaled

somewhere around $3.3 million (collectively).[8] Shirley does not contend that the 2012 Christmas gift would have been sufficient, on its own, to satisfy Dude's obligations to Plaintiffs under the PSA.[9]

Focusing next on the Marital Deduction Trust, the Court finds that the Plaintiffs would not be direct beneficiaries, and they would not be guaranteed to inherit any amount as remainder beneficiaries under the trust. The sole, direct beneficiary would be Shirley, and she would be empowered to do what she liked with the assets of the trust during her lifetime. In particular, she would be free to spend "so much or all of the principal" as she might direct. (Doc. 38-3, § 2.3D). Since the will would not require that *anything* be left to the Plaintiffs through the Marital Deduction Trust, it is disingenuous for Shirley to suggest that this trust would satisfy the will provision of the PSA.[10]

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[8] Each Plaintiff received a gift of $1.648 million. $1.648 million x 4 = $6.592 million. Shirley claims that half of each gift came from her, while the other half came from Dude. Half of $6.592 million is $3.296 million.

[9] Indeed, Shirley believes the assets that would flow to the Marital Deduction Trust would be valued at around $10 million, while the Plaintiffs place that value at over $12 million. Assuming half the value of the Marital Deduction Trust would be between $5 million and $6 million, the Christmas gift of $3.3 million falls short.

[10] It is equally disingenuous for Shirley to argue in her briefing that the trust mechanism set forth in Marillyn's will was identical to that of Dude's will, such that Plaintiffs should be estopped from complaining about the sufficiency of Dude's will since they did not complain about Marillyn's. Under Dude's will, Plaintiffs are left with only a remainder interest in a trust controlled exclusively by

Because Dude failed to engage in appropriate estate planning that would have left at least half of his estate to the Plaintiffs, he breached the promise he made to Marillyn as memorialized in the PSA. The breach here is obvious; it is not a close call. The remedy is specific performance of the PSA's will provision. *See Janes v. Rogers*, 271 S.W.2d 930, 934 (Ark. 1954) (finding that the appropriate remedy for breach of contract to make a will is specific performance). In considering how best to achieve specific performance, the Court must next evaluate what Dude and Marillyn intended when they agreed to the will provision of the PSA.

B. Meaning of the Term "Estate"

Shirley and Mr. Pope would have the Court impress a constructive trust on only Dude's probate estate, which they define as the separate property Dude owned at the time of his death that will pass under the 2012 will through probate. But the Plaintiffs suggest that the scope of the constructive trust and the definition of "estate" in the PSA should be interpreted more broadly. They believe that Dude and Marillyn made a straightforward agreement to leave half of the property they owned and controlled during their lifetimes to their daughters.

The Arkansas Supreme Court has articulated "three well-established principles of contract law" that should be considered as the Court interprets the PSA:

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their stepmother, whereas under Marillyn's will, the Plaintiffs received a direct, beneficial, and immediate interest in all assets their mother owned during her lifetime. Marillyn's will complied with the will provision of the PSA, while Dude's did not.

> [T]he first rule of interpretation of a contract is to give to the language employed the meaning which the parties intended. *Lee Wilson & Co. v. Fleming,* 203 Ark. 417, 156 S.W.2d 893 (1941). Second, in construing any contract, "[w]e must consider the sense and meaning of the words used by the parties as they are taken and understood in their plain, ordinary meaning." *Farm Bureau Mut. Ins. Co. of Arkansas, Inc. v. Milburn,* 269 Ark. 384, 386, 601 S.W.2d 841, 842 (1980). Third, "[d]ifferent clauses of a contract must be read together and the contract construed so that all of its parts harmonize, if that is at all possible, and, giving effect to one clause to the exclusion of another on the same subject where the two are reconcilable, is error." *Continental Casualty Co. v. Davidson,* 250 Ark. 35, 41, 463 S.W.2d 652, 655 (1971).

First Nat'l Bank of Crossett v. Griffin, 832 S.W.2d 816, 819 (Ark. 1992). Where, as here, a contract's terms are unambiguous, the meaning of the contract is an issue of law. *Surratt v. Surratt*, 148 S.W.3d 761, 768 (Ark. Ct. App. 2004). "The law presumes that the parties understood the import of their contract and that they had the intention which the terms of the contract manifest." *Connelly v. Beauchamp,* 13 S.W.2d 28, 30 (Ark. 1929).

Shirley maintains that Dude had the legal right—or, in other words, *the choice*—to hold his property in whatever way he liked during his lifetime, and she contends that his choice should be honored even after his death. Dude chose to title most of his

property jointly with Shirley, so when he died, all of that property passed to Shirley outside of probate. Then he chose to leave the residue of his estate in two trusts, one that (as it turns out) will not be funded after death and the other to be funded with assets that only Shirley is free to spend at her sole direction. During the motion hearing, the Court asked Shirley's counsel at what point Dude's contractual obligations to his daughters would overcome his freedom of choice. The Court first asked whether Dude could have complied with the PSA by leaving zero assets in his probate estate, and counsel readily answered in the negative. He said, "There must be something in the estate under the Property Settlement Agreement, so a null set would be a violation." Then the Court asked counsel what "minimum amount" would have been sufficient for Dude to leave in his probate estate and still satisfy his obligations under the PSA. Counsel responded that he was "not sure" but felt the amount Dude *actually left* was good enough. In other words, Shirley's position on this issue appears to be that *any amount* Dude chose to set aside for his daughters in a will would have satisfied the PSA.[11]

The colloquy the Court had with Shirley's counsel during the hearing highlights why Shirley's reading of the PSA is wrong. Plainly, Dude and Marillyn agreed

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[11] Counsel for Shirley doubled down on this argument in the final minutes of the hearing, explaining: "[I]f the decedent has a dollar, and leaves zero in an estate, that's the case that I would say there's been a breach." By that logic, if Dude had funded his probate estate with a dollar—despite owning more than $100 million on the day he died—he would have satisfied the PSA by leaving the Plaintiffs a collective inheritance of fifty cents.

to the will provision of the PSA for a reason: to create certainty in an uncertain future. They agreed to leave at least half their estates—not some lesser discretionary amount chosen by each party—to their daughters and not to other heirs. If Dude were permitted to avoid the basic certainty of contracting that the non-modifiable PSA provided, the will provision would be utterly meaningless.

The Court finds that the better interpretation of "estate" in the PSA, especially given the context of its use and purpose within the divorce proceedings, is all the property that Dude and Marillyn owned and controlled prior to their deaths—not merely *any amount* they chose to leave in their respective probate estates. *Cf. Nile v. Nile*, 734 N.E.2d 1153, 1161 (Mass. 2000) ("To say that a person has fulfilled his agreement to give to another all of his property at his death . . . , and then to turn right around and annul and effectually destroy such testamentary provision by conveying away all of his property to another, leaving nothing whatever upon which the will could operate, would be but keeping the word of promise to the ear and breaking it to the hope.") (internal quotation and citation omitted).

Though there is little Arkansas case law involving contracts to make wills, the two cases cited below support the Court's decision to impress a constructive trust over the property Dude enjoyed and controlled just prior to his death, including property that he intended to pass outside of probate directly to a joint owner. The first such illustrative case is *Gregory v. Estate of Gregory*, 866 S.W.2d 379 (Ark. 1993). H.T. and

Gladys Gregory, husband and wife, entered into a contract to make reciprocal wills. The contract provided that the couple would not revoke their wills without the consent of all beneficiaries. They then executed wills that that left their estates in trust for the benefit of their six children. When Gladys predeceased H.T., her property passed into the trust. A few years later, H.T. married Genevive. With his children's explicit consent, H.T. executed a codicil to his will that gave Genevive a life estate in the marital home but specified that it would pass to H.T.'s children upon her death. When H.T. died, Genevive tried to take her dower and homestead interests and statutory allowances against the will—and against the rights of H.T.'s children. The Arkansas Supreme Court recognized that there were "two competing public policies in this case—the right of a couple to contract to make mutual wills that are irrevocable and that dispose of both estates to third-party beneficiaries, and the right of a surviving spouse to take an elective share." *Id.* at 382. The court held that all of H.T.'s property, including personal and residuary property, "was subject to and encumbered by the superior contractual rights of the six children." *Id.* at 383. Relevant to the case at bar was the *Gregory* court's observation that H.T. "was without power to change the Agreement" he had made with Gladys and that "the children had an interest in their parents' property" by virtue of that agreement. *Id.* at 384.

The second case relied on by the Court is *Janes v. Rogers*, 271 S.W.2d 930 (Ark. 1954). There, the Arkansas Supreme Court held that the decedent, Ella Rogers, breached a contract with her husband, J.D., to execute reciprocal wills in favor of their four sons

equally. Two of the sons were Ella's by a prior marriage, and the other two sons were J.D.'s by a prior marriage. J.D. died before Ella, and the property the two of them held jointly passed directly to Ella by operation of law, as the property was held in tenancies by the entirety. However, a few years after J.D.'s death, Ella executed a new will that named her sons the sole beneficiaries of all her property. After J.D.'s sons sued to enforce the contract, Ella's sons made the argument that "since the property held by the entirety went to Ella . . . upon her husband's death, he had no interest which could be devised by his will." *Id.* at 933. The court disagreed, explaining:

> It is true that [Ella] took title to such real estate by operation of law and not by the will but this does not mean that the contract to make the will could not operate upon the real estate so acquired by her . . . . [A] contract between husband and wife like that involved here is applicable to property held by the spouses in an estate by the entirety, even though it would not pass under the will of either spouse but would devolve on the surviving spouse by operation of law.

Id. Ella's sons were directed by the court "to transfer to [J.D.'s sons] their share of the property in accordance with the contract." *Id.* at 934.

It is black letter law that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement." *W. Memphis Adolescent Residential, LLC v. Compton*, 374 S.W.3d 922, 925 (Ark. Ct. App. 2010) (citing Restatement

(Second) of Contracts § 205). When a person who has entered into a contract to make a will transfers property during his lifetime in a way that leaves little for probate, this "will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Nile*, 734 N.E.2d at 1160 (quotation marks and citation omitted) (interpreting the covenant of good faith and fair dealing in the context of a contract to make a will). The Court finds that the Plaintiffs are entitled to summary judgment on their breach of contract claim on the issue of liability. This outcome will allow them to receive the fruits of the contract their parents made.

C. Constructive Trust

The final issue for the Court to address is how to achieve specific performance of the PSA's will provision. "A constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that [she] would be unjustly enriched if [she] were permitted to retain it." *Cox v. Miller*, 210 S.W.3d 842, 848 (Ark. 2005). "The duty to convey the property may arise because it was acquired through . . . wrongful disposition of another's property." *Id.* at 849. A constructive trust has the effect of converting the person with the duty to convey "'into a trustee for the parties who in equity are entitled to the beneficial enjoyment.'" *Davidson v. Sanders*, 357 S.W.2d 510, 517 (Ark. 1962) (quoting Black's Law Dictionary, 4th Edition). Therefore, the Court will impress a constructive trust on half the property Dude owned and controlled up to the moment of his death, (as well as

any post-death interest, earnings, or proceeds), with the value of such to be determined at trial.

IV. CONCLUSION

For the foregoing reasons, **IT IS ORDERED** that the Motion for Summary Judgment (Doc. 89) filed by Separate Defendant Shirley Crain is **DENIED**, and the Motion for Partial Summary Judgment filed by Plaintiffs Cathee Crain, Lisa Crain, Marillyn Crain Brody, and Kristan Snell (Doc. 101) is **GRANTED**. The Plaintiffs are entitled to specific performance of the PSA, and the Court will impress a constructive trust on half the property that H.C. "Dude" Crain owned and controlled up to the moment of his death.

IT IS SO ORDERED this 24th day of May, 2021.

/s/ Timothy L. Brooks
TIMOTHY L. BROOKS
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-1674

[Filed August 14, 2023]

Lisa Crain, et al.	)
Appellees	)
	)
v.	)
	)
Shirley Crain	)
Appellant	)
	)
Ray Fulmer, Administrator of the Estate of H.C. Dude Crain, Jr.	)

Appeal from U.S. District Court for the
Western District of Arkansas - Ft. Smith
(2:20-cv-02038-TLB)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 14, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans