IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

IN RE: ESTATE OF HERMAN JEROME RUSSELL, SR., DECEASED.	**Civil Action File No.: 2017CV293800**
JOYCELYN DARBY ALSTON,	
Plaintiff,	
vs.	
DONATA RUSSELL MAJOR, HERMAN JEROME RUSSELL, JR., MICHAEL BRENT RUSSELL, JOIA MISHAARON JOHNSON, EDDIE B. BRADFORD, SYLVIA EUGENE RUSSELL, VERNON E. JORDAN, JR., ROBERT FINLEY, THE RUSSELL REALTY LIMITED PARTNERSHIP, THE RUSSELL HOLDINGS GENERAL PARTNERSHIP, THE DONATA RUSSELL MAJOR FAMILY LIMITED PARTNERSHIP, THE HERMAN JEROME RUSSELL, JR. FAMILY LIMITED PARTNERSHIP, AND THE MICHAEL BRENT RUSSELL FAMILY LIMITED PARTNERSHIP,	
Defendants.	

FINAL ORDER DISMISSING AMENDED COMPLAINT

This case is before the Court on the *Motion to Dismiss Verified Petition for Establishment of Heirship and Quantity of Interest and Complaint for Damages and Equitable Relief* (the "Motion to Dismiss") filed on September 22, 2017, by Defendants Donata Russell Ross (f/k/a Donata Russell Major), Herman Jerome Russell, Jr., Michael Brent Russell, Joia Mishaaron Johnson, Eddie B. Bradford, The Russell Realty Limited Partnership, The Russell Holdings General Partnership, The Donata Russell Major Family Limited Partnership, The Herman Jerome Russell, Jr. Family Limited Partnership, and The Michael Brent Russell Family Limited

Partnership (collectively, "Defendants"). Defendant Sylvia Eugene Russell filed her own Motion to Dismiss, which joined in Defendants' Motion to Dismiss by incorporating by reference the arguments made and relief sought in Defendants' Motion to Dismiss. On September 12, 2018, Plaintiff voluntarily dismissed without prejudice her Complaint as against Defendant Sylvia Russell only.

The Motion to Dismiss was argued by counsel for the Parties on July 24, 2018.

On September 14, 2018, Plaintiff filed a *First Amended and Restated Complaint* ("Amended Complaint"), which amended and restated her *Verified Petition for Establishment of Heirship and Quantity of Interest and Complaint for Damages and Equitable Relief* (the "Complaint"). Defendants and Plaintiff have submitted supplemental briefs that address the changes to the original Complaint that Plaintiff made through her Amended Complaint. Relying on their arguments in support of dismissal of the original Complaint and their supplemental arguments addressing the changes Plaintiff made to her Complaint through her Amended Complaint, Defendants seek dismissal of the Amended Complaint.

The Court has considered the Amended Complaint, the Motion to Dismiss, briefs in support and in opposition, supplemental briefs in support and opposition, and the arguments of counsel for the Parties at the oral hearing held on July 24, 2018. For the reasons set forth below, the Motion to Dismiss is **GRANTED**.

I. ALLEGATIONS IN THE AMENDED COMPLAINT.

In ruling on this Motion to Dismiss, this Court "must accept as true all well-pled material allegations in the complaint and must resolve any doubts in favor of the plaintiff." *Roberson v. Northrup*, 302 Ga. App. 405, 405 (2010) (citation and punctuation omitted). Notably, however, "[w]hile a trial court is required to consider a non-moving party's factual allegations to be true, it

is not required to accept the legal conclusions the non-party suggests that those facts dictate." *Trop, Inc. v. City of Brookhaven*, 296 Ga. 85, 87 (2014). *See also Mabra v. SF, Inc.*, 316 Ga. App. 62, 65 (2012) ("But in the absence of any specifically pled facts to support what amounted to a legal conclusion couched as fact, the trial court was not required to accept this conclusion as true.") (citation omitted). Against this standard, the Court considers the Amended Complaint.

This case arises out of Plaintiff's claim that she is a biological child of Herman J. Russell ("Mr. Russell"), born out-of-wedlock. Plaintiff alleges that because neither Mr. Russell nor the three children born of his marriage to Otelia Russell ((Defendants Donata Russell Ross ("Donata"), Herman Jerome Russell, Jr. ("Jerome"), and Michael Brent Russell ("Michael")) knew that Plaintiff was a biological child of Mr. Russell, Plaintiff is entitled to a proportionate share of all assets Mr. Russell transferred, disposed of, or conveyed to or for the benefit of Donata, Jerome, and Michael.

More specifically, Plaintiff's Amended Complaint contains three counts: (1) an equity claim that requests reformation of Mr. Russell's Will, various trusts, and various transactional documents (Am. Compl. ¶ 211), or, alternatively, rescission of those documents and direction that all assets pass to Mr. Russell's probate estate (*id.* at ¶ 212), or, alternatively, a finding of unjust enrichment (*see id.* at ¶ 213), or, alternatively, imposition of a constructive trust (*id.*), or, alternatively, imposition of an implied trust (*id.*), or, alternatively, compensatory damages (*id.* at ¶ 214); (2) a request for injunctive relief (*id.* at ¶¶ 217-18); and (3) a request for attorney's fees and costs (*id.* at ¶ 220). For the reasons discussed below, each count of Plaintiff's Amended Complaint is dismissed.

II. PLEA IN ABATEMENT.

In their *Supplement to Motion to Dismiss Verified Petition for Establishment of Heirship and Quantity of Interest and Complaint for Damages and Equitable Relief to Address Matters in First Amended & Restated Complaint and Plea in Abatement Regarding HJR Revocable Trust Claims*, filed on October 19, 2018, Defendants ask, based on the Plaintiff's Amended Complaint, that this Court order that the portion of this action relating to the HJR Revocable Trust is abated on the grounds that another substantially related action regarding the HJR Revocable Trust is pending in the Probate Court of Fulton County. In support of their *Plea in Abatement Regarding HJR Revocable Trust Claims*, Defendants attached to their pleading certified copies of a *Verified Petition for Declaratory Judgment*, filed in the Probate Court of Fulton County on January 9, 2017, and a *First Amended and Restated Verified Petition for Declaratory Judgment*, filed in the Probate Court of Fulton County on May 3, 2018. Before turning to the content of the declaratory judgment petitions, the Court notes that while generally on a motion to dismiss the Court cannot consider factual representations outside of the complaint without transforming it into a summary judgment motion, on a plea in abatement the Court may do so to inquire as to its own jurisdiction:

> when a motion to dismiss involves a factual issue as to a question of abatement, that is, lack of jurisdiction, improper venue, insufficiency of process, insufficiency of service of process or failure to join a party, the trial court is authorized under [OCGA § 9-11-12(d)] to hear and determine these defenses before trial without a jury on application of any party.

Marietta Props., LLC v. City of Marietta, 319 Ga. App. 184, 186 (2012). This Court, properly being able to consider the declaratory judgment petitions, now turns to those petitions.

On January 9, 2017, Donata, as Co-Executor of the Estate of Mr. Russell, filed a declaratory judgment petition in the Fulton County Probate Court seeking, among other things, declaratory judgments by the Probate Court that:

(i) Plaintiff is not a "child" under the Will of Mr. Russell;

(ii) Neither Plaintiff nor any of her descendants is entitled to inherit any probate assets from the Estate of Mr. Russell;

(iii) Plaintiff is not a "child" under the HJR Revocable Trust; and

(iv) Neither Plaintiff nor any of her descendants is entitled to inherit any assets that passed to or through the HJR Revocable Trust.

(Defs.' Supp. to Mot. to Dismiss V. Pet. & Plea in Abatement, at Exh. A.) While the Co-Executor of Mr. Russell's Estate filed a *First Amended and Restated Verified Petition for Declaratory Judgment* in the Probate Court on May 3, 2018, the Amended Declaratory Judgment Petition still contained these four requested declaratory judgments. (*Id.*, at Exh. B.)

On August 8, 2017, eight months after the Co-Executor filed her *Verified Petition for Declaratory Judgment* in the Probate Court, Plaintiff filed her original Complaint in this Court initiating this action, which Plaintiff subsequently amended on September 14, 2018.

Georgia law provides the circumstances under which a former action shall cause a latter action to abate:

> A former recovery or the pendency of a former action for the same cause of action between the parties in the same or any other court having jurisdiction shall be a good cause of abatement. . . .

O.C.G.A. § 9-2-44. The latter cause of action need not be identical to the first cause of action to be abated by the first:

> The plea in abatement has been held good even where the causes of action are, technically speaking, legally disparate and rest in opposite parties, if they arise out

> of the same transaction and if the second suit would resolve the same issues as the first pending suit and would therefore be "unnecessary, and consequently oppressive." ... A judgment in a prior suit adjudicating the legal or equitable title to the same land will estop a later inconsistent suit in ejectment among the same parties; or a later dispossessory proceeding; or other suit touching the right to entitlement between the parties. So, for the same reasons, a pending suit "for the same property" will, on a plea in abatement, bar a later inconsistent action in ejectment. . . .

Schoen v. Home Fed. Sav. & Loan Ass'n, 154 Ga. App. 68, 69 (1980) (citations and punctuation omitted).

Here, the parties in the Probate Court declaratory judgment proceeding overlap with the parties in this action insofar as both Plaintiff and the Co-Executor are parties to both actions. In light of the admitted breadth of Plaintiff's claims regarding the HJR Revocable Trust in this action, they may subsume the Co-Executor's declaratory judgment requests in the Probate Court. This is grounds for abatement. *See Atlanta Airmotive, Inc. v. Newnan-Coweta Airport Auth.*, 208 Ga. App. 906, 906 (1993) (plea in abatement held good if causes "arise out of the same transaction and if the second suit would resolve the same issues as the first pending suit and would therefore be unnecessary and consequently oppressive"). Furthermore, if the Probate Court agrees with the Co-Executor that neither Plaintiff nor her descendants have any interest in the HJR Revocable Trust, Plaintiff would have no basis to seek any relief in this Court relating to the HJR Revocable Trust. Accordingly, to the extent that Plaintiff's Amended Complaint seeks relief regarding the HJR Revocable Trust, it constitutes the same cause of action between the same parties and must therefore be abated and dismissed. Therefore, Defendants' *Plea in Abatement Regarding HJR Revocable Trust Claims* is **GRANTED** and Plaintiff's claims in her Amended Complaint regarding the HJR Revocable Trust are **ABATED** and **DISMISSED**.

III. COUNT I OF THE AMENDED COMPLAINT: EQUITY.

The Court now turns to the remainder of Defendants' Motion to Dismiss. The bulk of Plaintiff's Amended Complaint is contained in Count I, which is a general claim for "equity." Count I contains multiple claims for alternative relief, namely the reformation of the Will, various trusts, and various sale documents, or in the alternative, rescission or cancellation of those same documents, or in the alternative, a claim of unjust enrichment, or in the alternative, imposition of a constructive or implied trust, or in the alternative, compensatory damages. While Plaintiff's equity claims are broad, she is still required to have standing to bring such claims, and she is still required to plead a claim for relief that fits within the statutes and laws that govern her alleged claims for relief:

> The first maxim of equity is that equity follows the law. Equity cannot, therefore, override . . . the positive enactments of statutes. Where rights are defined and established by existing legal principles, they may not be changed or unsettled in equity. Although equity does seek to do complete justice, OCGA § 23-1-7, it must do so within the parameters of the law.

Cooksey v. Landry, 295 Ga. 430, 432 (2014) (internal citations and quotations omitted). *See Bloodworth v. Bloodworth*, 224 Ga. 717, 718 (1968) ("equity will never interfere with an honest fulfillment of an obligation which transgresses no law" and "equity should not undue a moral, legal and ethical act, which the deceased ordered to be done with his property"); *Murphy v. McCaughey*, 262 Ga. App. 570, 575 (2003) ("we recognize the well-established principle that '[a] party cannot do indirectly what the law does not allow to be done directly.'"). Even if the Court wanted to, it cannot override the authority of the legislature by adopting rulings on "public policy grounds" contrary to the statutory laws enacted by the General Assembly. *See Cooksey*, 295 Ga. at 434. Here, established statutes and established legal principles foreclose Plaintiff's claims for equitable relief, Plaintiff lacks standing to bring the claims, and Plaintiff fails to plead

recognized claims for relief. Because Plaintiff's equity claims fail to meet those standards of Georgia law that would permit her claims to move forward, Count I of Plaintiff's Amended Complaint is dismissed.

A. Tolling of the Relevant Statutes of Limitation.

Plaintiff's Complaint addresses statutes of limitation issues that were raised by Defendants in their Motion to Dismiss and during the hearing on July 24, 2018. "Where one relies on an exception to the operation of a statute of limitation, [s]he must clearly, plainly and distinctly plead facts which bring [her] within such exception." *Wallace v. Eiselman*, 219 Ga. 595, 596 (1964) (emphasis added). In the Amended Complaint, however, Plaintiff still has not sufficiently pled facts to support tolling of the applicable statutes of limitation.

In support of her argument that the applicable statutes of limitation do not apply to her claims, Plaintiff contends that she did not have copies of relevant documents that would have disclosed her claims to her until June 13, 2016, and, therefore, the statutes of limitation did not start to run until June 13, 2016. (Am. Compl. ¶¶ 190-91.) Plaintiff's argument, thus, is that she did not know of facts constituting her causes of action until she obtained documentation and, therefore, the statutes of limitation were tolled. Plaintiff's ignorance of facts, however, does not toll the statutes of limitation: "Absent fraud, a plaintiff's ignorance of the facts constituting a cause of action does not prevent the running of the statute of limitation." *See Koncul Enters., Inc. v. Fleet Fin., Inc.*, 279 Ga. App. 39, 41 (2006).

Here, Plaintiff has not alleged that her ignorance of certain facts was the result of fraud. Rather, Plaintiff contends that because she has alleged "mutual mistake," the statutes of limitation are tolled until the mistake has been, or by the exercise of reasonable diligence should have been, discovered. (Pl.'s Supp. Br. in Opp'n to Defs.' Mots. to Dismiss, at 3.) Plaintiff's attempt to rely on this alleged maxim is unavailing for two reasons. First, as discussed more

below, the alleged mutual mistake was not between Plaintiff and anyone. Plaintiff alleges that a mutual mistake among persons other than she allows her now to undo those documents and transactions. In other words, it was not Plaintiff's alleged mistakes that led to the allegedly inequitable result; it was the alleged mistakes of Mr. Russell, Donata, Jerome, and Michael. Thus, Plaintiff cannot avail herself of a tolling defense that is limited to the allegedly mistaken parties. Second, when a plaintiff contends that the statute of limitation is tolled "it is incumbent upon the party applying for the relief to show what impediments stopped him or her from discovering the mistake or fraud through reasonable diligence." *Evans v. Lipscomb*, 266 Ga. 767, 770 (1996). Plaintiff has not alleged any facts to support this argument.

Plaintiff's claim that, "in the exercise of reasonable diligence, [she] could not have discovered the existence of any of the claims asserted in this action prior to receiving the documents referenced above" is conclusory, and therefore, unavailing. (Am. Comp. ¶ 192.) "A plaintiff cannot sit quietly by for a length of time exceeding that named in the statute of limitations, and avoid its operation and save [her] cause of action by the mere allegation that [she] made the discovery only recently." *Jones v. Bd. of Regents of Univ. Sys. of Ga.*, 219 Ga. App. 448, 449(1) (1995) (citations and punctuation omitted). Plaintiff has the burden of pleading in her Amended Complaint facts that would toll the applicable statutes of limitation. *See Wallace*, 219 Ga. at 596. Plaintiff's Amended Complaint lacks the requisite factual allegations that may support tolling, such as when Plaintiff purportedly knew Mr. Russell was her biological father, what efforts Plaintiff took to understand her alleged interests as a biological daughter of Mr. Russell, and what obstacles prevented her from discovering her alleged interests. Thus, even if Plaintiff could avail herself of tolling based on an inability to discover her alleged claims through the exercise of reasonable diligence, Plaintiff has not stated what impediments allegedly

stopped her from discovering her claims through the exercise of reasonable diligence. *See Evans*, 266 Ga. at 770. Plaintiff's failure to plead facts such as these prevents her from relying on a tolling defense. *See Piedmont Eng'g & Constr. Corp. v. Balcor Partners-84 II, Inc.*, 196 Ga. App. 486, 489 (1990).

Accordingly, Plaintiff's Amended Complaint fails to plead sufficiently tolling of the applicable statutes of limitation and, therefore, the Court must apply the relevant statutes of limitation that are apparent from the face of the Amended Complaint.

B. Reformation, Modification, Rescission or Cancellation of the Will.

In her "Equity" claim, Plaintiff generally refers to "the transactions discussed above" (Am. Compl ¶ 195), "the above estate-planning transactions" (*id.* at ¶¶ 201-202), and "the transactions referenced above" (*id.* at ¶¶ 203-205) in her Amended Complaint without specifying the "estate-planning documents" or "transactions" to which she refers. Plaintiff then asks this Court to reform, rescind, cancel, or set aside "each of the documents comprising the transactions referenced above." (*Id.* at ¶¶ 211-12.)

First, these phrases appear to include the Will because the Will is attached to and "referenced above" in the Amended Complaint. (*See* Am. Compl. ¶¶ 37-47.) However, any attempt by Plaintiff to have this Court reform, rescind, cancel, or set aside the Will is jurisdictionally improper in that probate courts have exclusive, original subject matter jurisdiction over matters concerning Mr. Russell's estate, including the disposition and distribution of estate property. *See* O.C.G.A. § 15-9-30(a).

Second, each document upon which Plaintiff seeks relief must be examined separately because, among other things, they were executed at different times, and thus, different statutes of limitation, different statutes, and different case law may apply to each, and this Court is bound by the language contained within the respective documents.

Because the Amended Complaint can be construed to include the Will in Plaintiff's references to the documents she asks this Court to reform, rescind, cancel or set aside, the Court must address Plaintiff's claims to equitable relief regarding the Will.

"The probate court shall have exclusive jurisdiction over the probate of wills." O.C.G.A. § 53-5-1(a). Further, "[p]robate courts have authority, unless otherwise provided by law, to exercise original, exclusive, and general jurisdiction of the following subject matters: (1) The probate of wills; . . . (4) The sale and disposition of the property belonging to, and the distribution of, deceased persons' estates; . . . [and] (11) All other matters and things as appertain or relate to estates of deceased persons. . . ." O.C.G.A. § 15-9-30(a). "A superior court cannot enjoin the offer of a will for probate or cancel a will or order specific performance of a will." *Horn v. Gilley*, 263 Ga. 104, 105 (1993) (citing *Willis v. Willis*, 213 Ga. 45 (1957)).

In light of the foregoing, this Court lacks subject matter jurisdiction over Count I of Plaintiff's Amended Complaint as it relates to the Will, and, therefore, Count I as it relates to the Will is **DISMISSED**.

C. The Insurance Trust.

In her Amended Complaint, Plaintiff alleges that Mr. Russell intended to make a class gift to all of his biological children through the Insurance Trust. (Am. Compl. ¶¶ 176, 178.) Attached to the Amended Complaint is a copy of the Insurance Trust. (*Id.* at Exh. DD.)

In interpreting an express trust, this Court must "look first and foremost to the language therein and interpret that language to effectuate the intent of the settlor[]." *Ovrevik v. Ovrevik*, 242 Ga. App. 95, 97 (2000). The Court looks to parol evidence only if an ambiguity exists on the face of the document. *Id.*; *see Strange v. Towns,* 330 Ga. App. 876, 878 (2015). Plaintiff alleges that she is a child born out of wedlock. (Am. Compl. ¶ 1.) The Insurance Trust is unambiguous in its exclusion of children born out of wedlock.

The terms of the Insurance Trust expressly exclude children born out-of-wedlock from the definition of "children":

> (a) References in this agreement to "child" or "children" mean **lawful blood** descendants in the first degree of the parent designated; and references herein to "issue" and "descendants" mean **lawful blood** descendants in the first, second or any other degree of the ancestor designated. . . .

((Am. Compl., Exh. DD, at 47-48 (emphasis added).)

"In construing a trust instrument it is the duty of a court to find the intention of the settlor and to effectuate that intention insofar as the language used and the rules of law will permit." *DeLoach v. Miller,* 157 Ga. App. 229, 230 (1981). Thus, the Court must consider the use of the phrase "lawful blood" in reference to "child" or "children" in the Insurance Trust. The Court finds that the phrase "lawful blood" in reference to a child or children excludes children born out of wedlock. *See Hood v. Todd*, 287 Ga. 164, 166 (2010) ("Moreover, by defining the term 'children' as '*lawful* blood descendants,' Buffington also demonstrated his intent that his child born out of wedlock not be included as a beneficiary under his will."). The definitions of "child" and "children" in the Insurance Trust thus expressly exclude children born out of wedlock. As Plaintiff contends in her Amended Complaint that she is a child born out of wedlock (Am. Compl. ¶ 1), she is excluded from the Insurance Trust by its plain, unambiguous language.

Furthermore, even if Plaintiff were not excluded by the terms of the Insurance Trust, the seven-year time limitation to bring an action to modify or to set aside the Insurance Trust has long expired. *See Haffner v. Davis*, 290 Ga. 753, 756 (2012) (seven-year period of limitation to bring an action to reform a written document). The Insurance Trust is dated September 18, 1986. (Am. Compl. ¶ 173, Exh. DD). As determined above, Plaintiff has not pled facts sufficient to support taking her claims outside the statutes of limitation on the grounds that the exercise of reasonable diligence would not have allowed Plaintiff to discover the facts in support of her

claims. Therefore, the statutes of limitation relating to Plaintiff's claims regarding the 1986 Insurance Trust are not tolled and provide additional grounds for dismissing Plaintiff's claims regarding the 1986 Insurance Trust.

Accordingly, Plaintiff's claims regarding the Insurance Trust are **DISMISSED WITH PREJUDICE**.

D. Reformation, Modification, Rescission or Cancellation of the Trusts.

Plaintiff asks this Court to reform or to rescind numerous trusts. Because many of the documents upon which Plaintiff seeks relief were executed and distributions completed years ago, the Court first looks at the statutes of limitation that have expired and are apparent from the face of the Amended Complaint.

1. ***Reformation or rescission of the Herman Jerome Russell Revocable Trust.***

As determined above, Plaintiff's claims regarding the HJR Revocable Trust are abated and dismissed. Even if the HJR Revocable Trust claims were not subject to abatement, they still are subject to dismissal based on the applicable statute of limitation. Plaintiff seeks reformation or rescission of the Herman Jerome Russell Revocable Trust (the "HJR Revocable Trust") (Am. Compl. ¶¶ 211-12), which was last amended on October 22, 2014 (*id.* at ¶ 48). Mr. Russell died on November 15, 2014. (*Id.* at ¶ 27.) "Any judicial proceeding to contest the validity of a trust that was revocable immediately before the settlor's death shall be commenced within two years of the settlor's death." O.C.G.A. § 53-12-45(a). Plaintiff filed her Complaint on August 8, 2017, which is more than two years after Mr. Russell's death. Plaintiff argues that her claims do not fall within the two-year statute of limitation because she does not contest the "validity" of the HJR Revocable Trust. (Pl.'s Supp. Br. in Opp'n to Defs.' Mots. to Dismiss, at 2.) Plaintiff, however, seeks to modify, rescind, or set aside the document, which challenges the "validity" of

the document in its current form. *See Duncan v. Rawls*, 345 Ga. App. 345, 351 (2018), *cert. denied* (Oct. 22, 2018) (a claim to set aside a trust is akin to a challenge to the validity of a will). Further, Plaintiff's attempt to rely on a longer period of limitation for actions to reform a written instrument is unavailing. (Pl.'s Supp. Br. in Opp'n to Defs.' Mots. to Dismiss, at 2.) O.C.G.A. § 53-12-45(a) specifically addresses the time limit to challenge revocable trusts and, therefore, controls over both the common law seven-year period of limitation regarding reformation of written instruments and any general statutes regarding reformation of documents. *See La Fontaine v. Signature Research, Inc.*, 342 Ga. App. 454, 457 (2017) ("a specific statute prevails over common law"); *Huber Props., LLP v. Cobb County*, 318 Ga. App. 321, 323(1) (2012) (specific statute will prevail over a general statute to resolve any inconsistency between them). Accordingly, even if Plaintiff's claims regarding the HJR Revocable Trust were not abated, Count I, as it relates to the HJR Revocable Trust, is barred by the statute of limitations and is **DISMISSED WITH PREJUDICE**.

2. ***Plaintiff's standing to seek reformation or modification of the trusts.***

In addition to the statutes of limitation barring Plaintiff's claims regarding some of the trusts, Plaintiff's allegations in her Amended Complaint demonstrate that she lacks standing to bring the claims in Count I of her Amended Complaint with respect to all of the trusts. Specific provisions within the Georgia Trust Code govern reformation and modification of trusts.[1]

[1] Plaintiff has argued that if she is barred under the Trust Code from pursuing her trust-related claims, then she still may pursue modification or termination through general equity principles. The Trust Code, however, has statutes that are directly applicable to Plaintiff's claims and these statutes are therefore her only avenues for modification or termination of trusts. *See Huber Props., LLP,* 318 Ga. App. at 323(1) (specific statute will prevail over a general statute to resolve any inconsistency between them).

O.C.G.A. § 53-12-60 and O.C.G.A. § 53-12-61(d)[2] provide for reformation of trusts in certain circumstances. However, both statutes, which would permit modification in certain circumstances, explicitly provide that such a claim may be brought only by a beneficiary or a trustee of the trust. *See* O.C.G.A. §§ 53-12-60(b) ("A petition for reformation may be filed by the trustee or any beneficiary. . . ."); 53-12-61(e) ("A proceeding to approve a proposed modification or termination under this Code section may be commenced by a trustee or beneficiary."). Plaintiff is not a trustee and she is not a beneficiary.[3] "Beneficiary" is a defined term under the Trust Code: "a person for whose benefit property is held in trust, regardless of the nature of the interest, and includes any beneficiary, whether vested or contingent, born or unborn, ascertained or unascertained." O.C.G.A. § 53-12-2(2). Although Plaintiff argues in her response briefs and also argued during the hearing on July 24, 2018 that she is an "unascertained" beneficiary, that is not what Plaintiff states in her Amended Complaint. (*See, e.g.*, Am. Compl. ¶¶ 36 (Mr. Russell "did not include Plaintiff in his estate planning"); 119 (separate trusts created for each of the "Marital Russell Children"); 126 (a trust was not created for Plaintiff); 166 (Plaintiff not included a "beneficial owner with the Marital Russell Children in each of the 2013 Transactions"); 172 (Plaintiff not included a "donee of Mr. Russell's business interests"); 179 (Plaintiff not included as "a named beneficiary of the Insurance Trust"); 181 ("[u]pon information and belief, the Marital Russell Children are the beneficiaries of the 1993 Russell Siblings Trust"); 186 (Plaintiff not included as a beneficiary of the 1993 Russell Siblings Trust). Nowhere in her Amended Complaint does Plaintiff state that she is an unascertained beneficiary of the trusts.

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[2] The applicable provisions of this statute were contained in the former O.C.G.A. § 53-12-62 at the time Plaintiff filed her Complaint.

[3] Plaintiff does not contend that she is a trustee of any trust.

Plaintiff has not asked this Court to declare her a beneficiary or trustee of any existing trust. Rather, Plaintiff asks this Court to modify the trusts *to make her a beneficiary*. ((Am. Compl. ¶ 211 (alleging that the documents "should be reformed to . . . provide Plaintiff . . . with a . . . beneficial interest in each of the transferred assets. . . .")). The trust documents Plaintiff attached to her Amended Complaint conclusively establish that Plaintiff is not a beneficiary or a trustee of any trust and, therefore, she lacks standing to seek equitable relief regarding them.

i. HJR Irrevocable Trust.[4]

The income and remainder beneficiary of the HJR Irrevocable Trust, which is also entitled to principal encroachments, is Russell Holdings General Partnership. (Am. Compl., Exh. E, at 2.) During the term of the HJR Irrevocable Trust, if the Russell Holdings General Partnership is at any point not in existence, then the Russell Children Partnerships step in as the contingent beneficiaries. (*Id.*) Thus, Plaintiff is not a beneficiary or trustee of the HJR Irrevocable Trust and lacks standing to seek its modification or termination.

ii. HJR Revocable Trust.[5]

In the HJR Revocable Trust, Mr. Russell used the term "children" as a defined term, which excludes anyone other than Donata, Jerome, and Michael from the definition of "child":

> For *all purposes of this Trust Agreement*, including each and every trust created hereunder, references in this Agreement to Donor's "children," shall be deemed to mean HERMAN JEROME RUSSELL, JR., MICHAEL BRENT RUSSELL and/or DONATA RUSSELL MAJOR and any references in this Agreement to "descendant," "descendants," "lineal descendant" or "lineal descendants" shall be deemed to include any such child of the Donor, and his or her respective descendants. . . .

[4] As discussed further herein, Plaintiff's claims regarding the HJR Irrevocable Trust are also barred by the applicable statute of limitation.

[5] As discuss further herein, Plaintiff's claims regarding the HJR Revocable Trust are abated and, even if not subject to abatement, are barred by the applicable statute of limitation.

((Am. Compl., Exh. D, at 21 (emphasis added).) Thus, under the plain, unambiguous terms of the HJR Revocable Trust, the term "children" refers to only Donata, Jerome, and Michael and the term "descendants" refers to only Donata, Jerome, and Michael and their descendants (subject to certain limitations). Therefore, Mr. Russell's express intent in the words used in the HJR Revocable Trust is that no one other than Donata, Jerome, and Michael shall be considered "children" under that document. This Court is foreclosed from considering parol evidence to determine otherwise, including even considering parol evidence whether Mr. Russell had children other than Donata, Jerome, or Michael. *See Jackson v. Nowland,* 338 Ga. App. 614, 617-18 (2016) (trial court erroneously considered parol evidence of ages when evidence of ages would have created an ambiguity in the trust instrument and without such parol evidence there was no ambiguity). Accordingly, Plaintiff is not a beneficiary or trustee of the HJR Revocable Trust and cannot seek its modification or termination.

iii. Donata Russell Major 2013 Trust; Herman Jerome Russell, Jr. 2013 Trust; and Michael Brent Russell 2013 Trust.

Plaintiff also is not a beneficiary of the Donata Russell Major 2013 Trust (Am. Compl., at Exh. O), the Herman Jerome Russell, Jr. 2013 Trust (*id.* at Exh. P), or the Michael Brent Russell 2013 Trust (*id.* at Exh. Q).

The income beneficiaries of the respective trusts are the respective child and his or her respective living descendants, and the respective child and his or her living lineal descendants have certain rights to principal encroachments. (Am. Compl., Exh. O, at 1-2; Exh. P, at 1-2; Exh. Q, at 1-2.) The remainder beneficiaries of the respective trusts are the respective child's then living lineal descendants. (*Id.* at Exh. O, at 2; Exh. P, at 2; Exh. Q, at 2.) Only in the event that the respective child has no then living lineal descendants would the trust remainder be distributed to Mr. Russell's descendants, per stirpes. (*Id.* at Exh. O, at 3; Exh. P, at 3; Exh. Q, at

3.) However, Mr. Russell's "descendants" is a defined term in each trust and such definition excludes Plaintiff:

> References in this Agreement to Grantor's "children," shall be deemed to mean HERMAN JEROME RUSSELL, JR., MICHAEL BRENT RUSSELL and/or DONATA RUSSELL MAJOR and any references in this Agreement to "descendant," "descendants," "lineal descendant" or "lineal descendants" shall be deemed to include any such child of the Grantor, and his or her respective descendants. . . .

(*Id.* at Exh. O, at 5; Exh. P, at 4-5; Exh. Q, at 5.) Again, Mr. Russell's expressed intent through the plain words used is to exclude from the definition of "children" anyone other than Donata, Jerome, or Michael whom he expressly referenced by name rather than as a general class of his "children." Based on the language used in the document, this Court is prohibited from looking outside the trust to consider whether Mr. Russell even had children other than Donata, Jerome, or Michael. *See Jackson,* 338 Ga. App. at 617-18. Accordingly, Plaintiff is not a beneficiary or trustee of the Donata Russell Major 2013 Trust, Herman Jerome Russell, Jr. 2013 Trust, and Michael Brent Russell 2013 Trust and cannot seek their modification or termination.

iv. Insurance Trust.

As determined above, the plain language of the Insurance Trust excludes children born out-of-wedlock as "children" for purposes of the Insurance Trust. Accordingly, Plaintiff is not a beneficiary or trustee of the Insurance Trust and cannot seek its modification or termination.

v. 1993 Russell Siblings Trust.

In her Amended Complaint, Plaintiff expressly states that she is not a beneficiary of the 1993 Russell Siblings Trust. ((Am. Compl. ¶¶ 181 ("Upon information and belief, the Marital Russell Children are the beneficiaries of the 1993 Russell Siblings Trust."); 186 ("the failure to include Plaintiff as a beneficiary of the 1993 Russell Siblings Trust . . . .").) Accordingly,

Plaintiff is not a beneficiary or trustee of the 1993 Russell Siblings Trust and cannot seek its modification or termination.

Furthermore, with respect to the 1993 Russell Siblings Trust, the seven-year period of limitation has long since expired to modify or set aside the 1993 Russell Siblings Trust. As determined above, Plaintiff has not alleged facts sufficient to support taking her claims outside the statutes of limitation on the grounds that the exercise of reasonable diligence would not have allowed Plaintiff to discover the facts in support of her claims. Therefore, the periods of limitation relating to Plaintiff's claims regarding the 1993 Russell Siblings Trust are not tolled and have expired, providing additional grounds for dismissing Plaintiff's claims regarding the 1993 Russell Siblings Trust.

Because Plaintiff is neither a trustee nor beneficiary of the trusts she seeks to have reformed, Plaintiff lacks standing to pursue modification of these instruments and Count I of Plaintiff's Amended Complaint as it relates to the modification or reformation of trusts is **DISMISSED WITH PREJUDICE.**

3. ***Plaintiff's standing to seek judicial termination of the trusts.***

Plaintiff's claims seeking to terminate the trusts are similarly subject to dismissal. The Trust Code specifically provides the circumstances under which a trust may be judicially terminated. *See* O.C.G.A. § 53-12-61(d)(6).[6] As is the case with petitions for modification of trusts, petitions for termination of trusts may be brought only by a trustee or beneficiary. O.C.G.A. § 53-12-61(e) ("A proceeding to approve a proposed modification or termination under this Code section may be commenced by a trustee or beneficiary.").

[6] O.C.G.A. § 53-12-61(d)(6) carries over some but not all the provisions of former O.C.G.A. § 53-12-64(b). Notably omitted is the provision that permitted termination if "*[o]wing to circumstances not known to or anticipated by the settlor*, the continuance of the trust would defeat or substantially impair the accomplishment of the purposes of the trust." O.C.G.A. § 53-12-64(b)(3) (2010) (repealed) (emphasis added).

Moreover, should Plaintiff be successful on her claims to terminate the trusts, she has failed to plead that she would receive a benefit from trust termination by failing to allege that she is a beneficiary under an existing trust or under the Will. This, therefore, also demonstrates her lack of standing to bring trust termination claims. *See Julian v. Brooks*, 269 Ga. 167, 167 (1998) ("Plaintiffs who base a claim on their status as heirs at law of a decedent cannot maintain a proceeding to cancel deeds executed by the decedent in favor of the defendant until it is finally determined by a court of competent jurisdiction that the decedent died intestate."). Plaintiff has not alleged that, if the trusts were set aside, she would receive any benefit. Indeed, she asks the Court to provide her with a benefit if the trusts were set aside. ((Am. Compl. ¶ 212 (requesting that the Court rescind and cancel the documents and "direct that all of the assets transferred therein pass to each of Mr. Russell's biological children in equal shares.").) Accordingly, Plaintiff's claims regarding cancellation of the trusts are dismissed for lack of standing.

Because Plaintiff is neither a trustee nor beneficiary of the trusts she seeks to have terminated, Plaintiff lacks standing to pursue termination of these instruments, and Count I of Plaintiff's Amended Complaint as it relates to the termination, cancellation, or rescission of trusts is **DISMISSED WITH PREJUDICE**.

4. ***Plaintiff's statement of a claim for relief related to the trusts.***

Notwithstanding the foregoing, even if Plaintiff had standing to pursue the claims in Count I relating to the trusts, Plaintiff has failed to state a claim upon which relief can be granted. While the Court must take Plaintiff's factual allegations as true on this Motion to Dismiss, the Court need not accept Plaintiff's conclusions. *Id.* ("But in the absence of any specifically pled facts to support what amounted to a legal conclusion couched as fact, the trial court was not required to accept this conclusion as true.") (citations omitted). Plaintiff's Amended Complaint contains numerous allegations regarding Mr. Russell's alleged "intent"

(Am. Compl. ¶¶ 35, 60, 63, 73, 79, 109, 113, 123, 126, 163, 167, 169, 172, 178, 182, 185-86) and alleged "mistakes" (*id.* ¶¶ 61, 72, 77, 110, 124, 164, 170, 183, 201). These are conclusions in need of supporting facts, which the Amended Complaint does not contain. Therefore, Plaintiff's claims relating to the trusts must be dismissed. *See Montia v. First-Citizens Bank & Trust Co.*, 341 Ga. App. 867, 870 (2017) (trial court not required to accept legal conclusions on a motion to dismiss where there are no specifically pled facts to support the conclusions).

Furthermore, Plaintiff's claims regarding the trusts fail to provide Defendants with sufficient notice of her claims and the relief requested insofar as Plaintiff has failed to plead which provisions of which trusts she wants modified and how she wants those provisions modified, or which of the grounds for termination under the Trust Code she contends applies to her claims. Plaintiff falls short of the notice pleading standards by failing to plead the provisions of the trusts she wants modified, how she wants those provisions modified, and on which basis for termination she relies. Thus, even if Plaintiff had standing to bring her trust-related claims, she still has failed to state a claim upon which relief can be granted, and, therefore, these claims are **DISMISSED WITH PREJUDICE**.

E. Reformation, Modification, Rescission or Cancellation of the Sale Documents.

In her Count I for equity, Plaintiff asks this Court to reform or to rescind and cancel "the sales contracts, partnership agreements, and other documents underlying the 1993 Transactions and the 2013 Transactions, and any other document that Mr. Russell used to transfer his wealth and business interests to or for the benefit of the Marital Russell Children. . . ." (Am. Compl. ¶¶ 211-12.) Plaintiff's "equity" claims seeking reformation or rescission and cancellation of documents underlying the sale of assets belonging to Mr. Russell in 1993 and 2013 are subject to dismissal for several reasons.

1. ***Statutes of limitation and reformation or rescission of documents involved in the 1993 Transactions.***

Plaintiff seeks reformation or rescission of the HJR Irrevocable Trust, dated April 12, 1993 (Am. Compl. ¶¶ 69-70, Exh. E), and numerous transactional documents executed in 1993 that effectuate the "1993 Transactions" (*id.* at ¶¶ 66-113, 211-12). "An action to reform a written document may be brought within seven years from the time the cause of action accrues." *Haffner*, 290 Ga. at 756. In addition, an action to rescind or cancel a contract must be brought within six years. O.C.G.A. § 9-3-24 ("All actions upon simple contracts in writing shall be brought within six years after the same become due and payable."). Plaintiff filed her original Complaint more than seven years after these documents were created and more than seven years after the transactions of which she complains.

As determined above, Plaintiff has not pled facts sufficient to support taking her claims outside the statute of limitation on the grounds that the exercise of reasonable diligence would not have allowed Plaintiff to discover the facts in support of her claims. Therefore, the statutes of limitation relating to Plaintiff's claims regarding the 1993 Transactions are not tolled.

Moreover, Plaintiff has attached to her Amended Complaint documents that demonstrate that she had constructive notice of the 1993 Transactions. Plaintiff has attached:

1. Certificate of Limited Partnership Filing for the Donata Russell Major Family Limited Partnership, stamp-filed by the Secretary of State on December 22, 1993, which indicates that Donata, Jerome, and Michael are the General Partners of this partnership. (Am. Compl., at Exh. F.)
2. Certificate of Limited Partnership Filing for the Herman Jerome Russell, Jr. Family Limited Partnership, stamp-filed by the Secretary of State on December

22, 1993, which indicates that Jerome is the General Partner of this partnership. (Am. Compl., at Exh. G.)

3. Certificate of Limited Partnership Filing for the Michael Brent Russell Family Limited Partnership, stamp-filed by the Secretary of State on December 22, 1993, which indicates that Michael is the General Partner of this partnership. (Am. Compl., at Exh. H.)

4. Certificate of Limited Partnership Filing for The Russell Realty Limited Partnership, stamp-filed by the Secretary of State on December 20, 1993, which indicates that Mr. Russell is the General Partner of this partnership. (Am. Compl., at Exh. J.)

Plaintiff argues that these documents did not put her on notice of her claims; however, these documents disclose the existence of the very entities of which she asks this Court to reform, rescind, or set aside their governing documents. Plaintiff alleges that these partnerships were an integral part of the 1993 Transactions. (Am. Compl. ¶¶ 75-92.) Moreover, Plaintiff asks the Court to reform, rescind, cancel, or set aside these partnership agreements. (*Id.* at ¶¶ 211-12.) Further, Plaintiff alleges that a partnership identical to those for Donata, Jerome, and Michael should have been created for her. (*Id.* at ¶¶ 78-79.) Therefore, for Plaintiff to succeed in obtaining the relief she seeks with respect to the 1993 Transactions, Plaintiff must succeed in having the Court take "equitable" action regarding these partnerships. The publicly-filed documents attached as Exhibits F, G, H, and J to Plaintiff's Amended Complaint, however, establish that Plaintiff's claims regarding the 1993 Transactions are time barred.

The Revised Uniform Limited Partnership Act requires that limited partnerships file with the Secretary of State a certificate of limited partnership, which the Secretary of State files in his

office. O.C.G.A. § 14-9-206(a). When statutes require state authorities to keep and maintain records, such records are "intended to charge constructive notice of their contents to the general public, and correspondingly to afford opportunity to the general public to learn the facts which such records disclose." *See Atlanta Title & Trust Co. v. Tidwell*, 173 Ga. 499, 512 (1931). Thus, where an examination of public records would reveal facts relating to a plaintiff's claim, the statute of limitation will not be tolled. *See Cohen v. Wachovia Mortgage Corp.*, 332 Ga. App. 109, 111 (2015) (party charged with notice of what was in publicly recorded property records and, thus, statute of limitation would not be tolled). On the face of Plaintiff's Amended Complaint, it is clear that Plaintiff had constructive notice of the 1993 Transactions, including the fact that certificates of partnership were filed on December 22, 1993 for partnerships in the name of each of her alleged half-siblings. Twenty-four years later, Plaintiff petitioned this Court to reform, rescind, cancel or set aside the partnership agreements for those partnerships.

Accordingly, Count I of Plaintiff's Amended Complaint as it relates to the 1993 HJR Irrevocable Trust and 1993 Transactions is barred by the statute of limitations, and, therefore, is **DISMISSED WITH PREJUDICE**.

2. ***Plaintiff's standing to seek reformation or rescission of the sale documents.***

First, Plaintiff's claims regarding these documents are dismissed because Plaintiff lacks standing to seek the reformation or rescission of documents to which she is a stranger. Georgia law is clear that "only parties and their privies have standing to seek reformation of a contract." *American Teleconferencing Servs., Ltd. v. Network Billing Sys., LLC*, 293 Ga. App. 772, 778 (2008) (citations omitted). Moreover, only the original parties to a conveyance, or persons who are in privity to the conveyance, have the right to reform that conveyance. *See Rawson v. Brosnan*, 187 Ga. 624 (1939). *See also Williams v. Fayette County*, 270 Ga. 528, 529 (1999)

(reformation of an instrument is not available to a third party); *Gregorakos v. Wells Fargo Nat'l Ass'n*, 285 Ga. App. 744, 746 (2007) (equitable remedy of reformation limited to those who are either parties to deed or in privity with such original parties and, where, third party has no cognizable legal interest in property at time of transaction, that third party lacks standing to seek reformation); *Moseley v. Interfin. Mgmt. Co.*, 224 Ga. App. 80, 84 (1996) ("[R]eformation is not available to a stranger to the deed."); *Breus v. McGriff*, 202 Ga. App. 216, 216 (1991) ("[S]trangers to the assignment contract . . . have no standing to challenge its validity."). Because Plaintiff is neither a party nor a privy to any of the transactional documents, she lacks standing to seek their reformation. *Id.*

The statutes upon which Plaintiff relies further illustrate that the equitable remedies she seeks are not available to strangers to the transaction, (*see* Am. Compl. ¶¶ 211-12):

- O.C.G.A. § 23-2-21: definition of "mistake";
- O.C.G.A. § 23-2-22: equity may interfere where there is a gross injustice to one party and unconscionable advantage to another party based on a mistake of law regarding the effect of the contract made by the parties to the contract;
- O.C.G.A. § 23-2-24: mistake of fact raised by the complaining party;
- O.C.G.A. § 23-2-25: accident or mistake in the form of conveyance contrary to the intention of the parties to the contract;
- O.C.G.A. § 23-2-30: mutual mistake between the parties to the contract;
- O.C.G.A. § 23-2-31: mistake of parties to the contract;
- O.C.G.A. § 23-2-54: surprise as fraud; and
- O.C.G.A. § 13-5-4: consideration upon which contract is given is a mutual mistake.

In her argument, Plaintiff concedes that these statutes "contemplate the 'mistake' complained of being between the parties to an agreement. . . ." (Pl.'s Consolidated Br. in Opp'n to Defs.' Mots. to Dismiss, at 41.) Thus, on the face of the statutes, because Plaintiff is not a party to these agreements, she is not entitled to the relief she seeks.

Moreover, the documents attached by Plaintiff to her Amended Complaint demonstrate that she was not only a stranger to the transactions she seeks to reform, cancel, or set aside but she is also a stranger to each of the entities involved in those transactions. The Donata Russell Major Family Limited Partnership, Herman Jerome Russell, Jr. Family Limited Partnership, and Michael Brent Russell Family Limited Partnership are each a partnership created by Donata, Jerome, and Michael, respectively, of which Mr. Russell was not a partner. (Am. Compl., at Exhs. F-H.) As a stranger to these partnership agreements, Plaintiff lacks standing to challenge them. *See Breus*, 202 Ga. App. at 216. Moreover, Plaintiff's contentions regarding Mr. Russell's alleged intent and alleged mistake are not relevant where Mr. Russell is not a party to the documents of which Plaintiff seeks reformation or cancellation.

In addition, with respect to The Russell Realty Limited Partnership, in particular, at the relevant time, Mr. Russell and his wife, Otelia, were the only partners. (Am. Compl, at Exh. J.) Throughout her Amended Complaint, Plaintiff alleges that she should have been treated as if she were a "fourth child." With respect to The Russell Realty Limited Partnership, however, the children born of Mr. Russell's marriage to Otelia were not partners in the partnership with respect to the 1993 Transactions. Because Donata, Jerome, and Michael were not partners in The Russell Realty Limited Partnership at the relevant time, Plaintiff cannot be inserted as a partner in this partnership. Thus, any claim of Plaintiff to modify or terminate The Russell

Realty Limited Partnership fails and so, too, fail Plaintiff's claims regarding the 1993 Transactions.

Furthermore, even if Plaintiff were successful in setting aside the transactional documents, at best, the assets would have been owned by Mr. Russell at the time of his death and subject to the terms of his Will. "Plaintiffs who base a claim on their status as heirs at law of a decedent cannot maintain a proceeding to cancel deeds executed by the decedent in favor of the defendant until it is finally determined by a court of competent jurisdiction that the decedent died intestate." *Julian*, 269 Ga. at 167 (citations omitted). *See McKie v. McKie*, 215 Ga. 312, 314 (1959) ("[T]he plaintiffs, as heirs at law of their deceased father, cannot maintain their proceeding to cancel the deed which he made to the defendant W.H. McKie, Sr., until it is finally determined by a court of competent jurisdiction that the decedent under whom they claim died intestate; and this proposition is well settled by the unanimous holdings of this court. . . .") (internal citations omitted); *Bowman v. Bowman*, 206 Ga. 262, 266 (1949) (wife lacked standing to set aside quitclaim deed executed by husband because she did not show she was entitled to take under his estate). Mr. Russell did not die intestate (Am. Compl. ¶¶ 37-38, 44), and therefore, Plaintiff cannot maintain a proceeding to set aside documents relating to the disposition of non-probate assets unless she can show that she takes under his Will – a question over which this Court does not have jurisdiction.

3. ***Plaintiff's allegations of a mutual mistake.***

Second, though Plaintiff argues that there was a mutual mistake among the parties to the transactions from which she can benefit as a stranger to those transactions, the allegations in Plaintiff's Amended Complaint actually allege ignorance of fact, not mutual mistake. Plaintiff alleges as follows:

- "Upon information and belief, at no time prior to his death did Mr. Russell know that Plaintiff was his biological child. . . ." (Am. Compl. ¶ 25.)
- "Upon information and belief, at no time prior to Mr. Russell's death did any of Defendants know that Plaintiff was Mr. Russell's biological child." (*Id.* at ¶ 26.)
- "Upon information and belief, Mr. Russell did not include Plaintiff in his estate planning *only because he did not know* that Plaintiff was his biological child." ((*Id.* at ¶ 36 (emphasis added).)
- "Upon information and belief, Mr. Russell did not intend to disinherit any of his biological children and would not have disinherited Plaintiff *had he been aware* that she was his biological child." ((*Id.* at ¶ 62 (emphasis added).)

"Mistake of fact presupposes some knowledge thereof. Lack of knowledge or ignorance of a fact is not the same as mistake. Lack of knowledge or ignorance implies a total want of knowledge in reference to the subject matter; mistake admits knowledge, but implies a wrong conclusion. Mere ignorance of a fact does not justify reformation." *Prince v. Friedman*, 202 Ga. 136, 139-40 (1947) (internal citations omitted). Plaintiff claims that the transactional documents should be reformed because Mr. Russell, Donata, Jerome, and Michael did not know she existed and was Mr. Russell's biological child. Plaintiff repeatedly alleges in her Amended Complaint that Mr. Russell would have acted differently "had Mr. Russell known that Plaintiff was his biological child." ((Am. Compl. ¶¶ 78, 112, 125, 166, 171; *see also id.* at ¶¶ 179, 183, 186 (using "had he known" as a variation on "had Mr. Russell known").) What is alleged in the Amended Complaint, therefore, is a lack of knowledge, not mutual mistake, and, as a matter of law, equity will not provide the relief requested by Plaintiff. *See Williams v. Lockhart*, 221 Ga. 343, 344

(1965) ("Ignorance of a fact by both parties is no cause for a rescission or cancellation of a deed.").

4. ***Plaintiff's request for the creation of instruments for her benefit.***

Third, though Plaintiff argues that documents should be reformed so as to provide for her, the allegations in Plaintiff's Amended Complaint do not allege that there was a mistake in the *terms* of the documents, but, rather, that *new, separate* documents should be created for her. For equitable relief to correct a mutual mistake, the mutual mistake must be a "misconception in respect of the terms and conditions of a written instrument. . . ." *Yeazel v. Burger King Corp.*, 241 Ga. App. 90, 94 (1999). Plaintiff does not allege that Mr. Russell and the other parties to the relevant documents made a mistake in the terms of each instrument. Instead, Plaintiff's Amended Complaint alleges that a similar transaction also should have been entered into for her benefit. (*See, e.g.*, Am. Compl. ¶¶ 78 ("Upon information and belief, Mr. Russell would have directed his counsel to prepare a partnership for Plaintiff. . . ."); 125 ("Upon information and belief, Mr. Russell would have created a trust for Plaintiff. . . .").) However, "reformation is not available to correct a failure to prepare and execute a document." Restatement (Third) Property (Wills & Don. Trans.) § 12.1 cmt. h (2003). Thus, Plaintiff's claim that a partnership, trust, or other entities or instruments would have been created for her or including her, but for a mutual mistake, fails as a matter of law, and therefore, her claims are subject to dismissal.

Because Plaintiff is a stranger to the transactional documents she seeks to modify or rescind and cancel and because Plaintiff has not pled that she would receive a benefit if the transactional documents were set aside, Plaintiff lacks standing to seek the modification or rescission and cancellation of the transactional documents. Furthermore, Plaintiff has not pled a mutual mistake in the terms of the documents, but, rather, a lack of knowledge about her existence and her alleged relationship to Mr. Russell, for which equity will not provide

modification or rescission. Moreover, Plaintiff contends that, had Mr. Russell been aware of her existence, he would have created certain instruments for her benefit, but equity will not interfere to force the creation of documents.

Therefore, Count I of Plaintiff's Amended Complaint as it relates to the modification, reformation, termination, cancellation, or rescission of transactional documents is **DISMISSED WITH PREJUDICE**.

F. Unjust Enrichment.

As part of her equity claim, Plaintiff makes a claim of unjust enrichment. ((Am. Compl. ¶¶ 208 ("the Marital Russell Children have been unjustly enriched), 213 (requesting imposition of a constructive trust).) As discussed below, Plaintiff has failed to plead a claim for unjust enrichment.

First, Plaintiff cannot maintain a claim for unjust enrichment because valid documents govern the disposition of the assets involved in the claim. "The theory of unjust enrichment applies when there is no legal contract and when there has been a benefit conferred which would result in an unjust enrichment unless compensated." *Smith Serv. Oil Co., Inc. v. Parker*, 250 Ga. App. 270, 271 (2001) (citations omitted). Where there are legal documents as to the subject matter of the dispute, no unjust enrichment claim exists.

Here, Plaintiff has pled the existence of:

- A Will, which governs the probate assets. (Am. Compl. ¶¶ 37-38, Exh. B.)
- The Herman Jerome Russell Revocable Trust, which is the residual beneficiary of the Estate. (*Id.* at ¶¶ 48-49, Exh. D.)
- Various transactional documents related to the "1993 Transactions," which were sales through which Mr. Russell divested ownership of certain assets. ((*Id.* at

¶¶ 69-70, Exh. E ("HJR Irrevocable Trust"); 75-88, Exhs. F-J (partnership agreements); 93-94, Exhs. K (transfer documents); 95-96, Exh. L (purchase agreement); 97-98, Exh. M (note); 99, Exh. N (guaranty agreement).)

- Various transactional documents related to the "2013 Transactions," which also were sales through which Mr. Russell divested ownership of certain assets. ((*Id.* at ¶¶ 119-22, Exhs. O-Q (trusts); 133-41, Exhs. R-U (numerous transactional documents); 142-46, Exhs. V-Y (promissory notes); 149-53, Exhs. Z-CC (security agreements).)
- An insurance trust. (*Id.* at ¶ 174, Exh. DD.)
- An insurance policy payable to the 1993 Russell Siblings Trust. (*Id.* at ¶ 180.)

Plaintiff asks that the Court modify the above documents to include her. (*Id.* at ¶ 211.) In the alternative, Plaintiff requests that, if not modified, the documents be rescinded (*id.* at ¶ 212); however, Plaintiff does not allege that the documents do not govern the relevant transactions. Indeed, it is because they govern the relevant transactions that Plaintiff seeks relief regarding them. Because Plaintiff does not allege that no valid documents govern the disposition of the assets involved in her claim and because, to the contrary, she has pled the existence of documents she would like this Court to reform or rescind, Plaintiff not only has failed to plead elements of an unjust enrichment claim but has instead pled facts that contradict and even preclude an unjust enrichment claim.

Second, Plaintiff did not confer the benefit to those whom she claims are unjustly enriched. *See Tuvim v. United Jewish Cmtys, Inc.*, 285 Ga. 632, 635(2) (2009) ("Unjust enrichment applies when as a matter of fact there is no legal contract, but when the party sought to be charged has been conferred a benefit *by the party contending an unjust enrichment* which

the benefitted party equitably ought to return or compensate for.") (emphasis added) (citations omitted). *See also Navy Fed. Credit Union v. McCrea*, 337 Ga. App. 103, 107 (2016) (no cause of action for unjust enrichment where complainant did not confer the alleged benefit). Here, Plaintiff does not plead that she conferred a benefit to Defendants. Instead, she argues that she does not need to confer the benefit if money intended for her was wrongfully given to someone else. Plaintiff improperly relies on a scenario where one party was legally obligated to pay party X, but instead paid party Y, in support of her unjust enrichment claim. *See City of College Park v. E. Airlines, Inc.*, 250 Ga. 741, 743 (1983). Although X did not confer the benefit on Y, according to Plaintiff, Y was unjustly enriched and X was entitled to restitution from Y. This, however, is not the factual scenario pled by Plaintiff in her Amended Complaint. Plaintiff does not allege that Mr. Russell was under a legal obligation to pay Plaintiff. Indeed, he was not. *See* O.C.G.A. § 53-4-1 (testator entitled to exclude children from taking under testator's will). Plaintiff alleges that Mr. Russell *gifted* the property to Donata, Jerome, and Michael. ((*See, e.g.*, Am. Compl. ¶¶ 108 ("[T]he 1993 Transactions must be taken together and analyzed by the Court as a single donative transfer from Mr. Russell to the Marital Russell Children."); 162 ("[T]he 2013 Transactions must be taken together and analyzed by the Court as a single donative transfer from Mr. Russell to the Marital Russell Children.").) Further, Plaintiff pleads that she should have been a donee of Mr. Russell's business interests, *i.e.*, the recipient of a gift. (Am. Compl. ¶ 172.)

Under these alleged facts and conclusions, Plaintiff is not entitled to a claim of restitution as a matter of law. "It is well settled in this State that a court of equity has no power to grant relief by way of reforming a deed at the behest of a volunteer. 'This rule is based upon the reasonable proposition that the volunteer has no claim on the grantor. If there is a mistake or a

defect, it is a mere failure in a bounty, which, as the grantor was not bound to make, he is not bound to perfect.'" *Sorrells v. Smith*, 227 Ga. 262, 263 (1971) (quoting *Adair v. McDonald*, 42 Ga. 506, 507 (1871)). *See also Stoker v. Bellemeade, LLC*, 272 Ga. App. 817, 819(1) (2005) (quoting Restatement (First) of Restitution (Unjust Enrichment) § 1 cmt. c (1937)) ("[O]ne who makes a gift or voluntarily pays money which [s]he knows [s]he does not owe confers a benefit[, and she is not] entitled to restitution."), *reversed, in part, on other grounds*, 280 Ga. 645 (2006)); *Prater v. Sears*, 77 Ga. 28, 32 (1886) ("On the face of the accepted conveyance, it is a mere voluntary deed; on the contract sought to be set up, it is a binding deed for value. The other side to it is dead. If a mere voluntary conveyance, a mistake in it will not be corrected against heirs, which is the case here, nor will a specific performance of it, when corrected, be decreed."); Restatement (First) of Restitution (Rights of Intended Donee) § 127 cmt. a (1937) ("An intended donee ordinarily has no right to obtain property intended for him either from a grantor who did not successfully complete his intended gift or from a grantee to whom the grantor has transferred such property by mistake, unless the grantee obtained the property by fraud."). Because Plaintiff has failed to allege that she conferred the benefit on those whom she claims were unjustly enriched and, to the contrary, has pled that another person – Mr. Russell – conferred that benefit, Plaintiff not only has failed to plead elements of an unjust enrichment claim but also has pled facts that contradict and preclude an unjust enrichment claim.

Third, Plaintiff did not allege a contract claim. "[A] claim for unjust enrichment is not a tort, but an alternative theory of recovery if a contract claim fails." *Tidikis v. Network for Med. Comm'ns & Research, LLC*, 274 Ga. App. 807, 811(2) (2005). Where a plaintiff asserts unjust enrichment as an independent claim and *not* as an alternative theory of recovery for a failed contract, the claim is subject to dismissal. *See Cash v. LG Electronics, Inc.*, 342 Ga. App. 735,

742 (2017) ("Finally, [plaintiff]'s claims for equitable relief fail. . . . [S]he did not plead unjust enrichment as an alternate theory of recovery based on a failed contract. Thus, her claim for such relief cannot succeed.") (citations omitted); *Wachovia Ins. Servs., Inc. v. Fallon*, 299 Ga. App. 440, 449 (2009) ("Because Wachovia Insurance asserts unjust enrichment as a separate tort and not an alternative theory of recovery for a failed contract, this claim fails as a matter of law.") (citations omitted). Because Plaintiff does not plead unjust enrichment as an alternative theory of recovery to a contract claim, Plaintiff does not plead elements of an unjust enrichment claim.

"Unjust enrichment is an equitable principle that may apply when there is no legal contract between the parties." Ceasar v. Wells Fargo Bank, N.A., 322 Ga. App. 529, 534 (2013). Here, it is undisputed that valid documents govern the disposition of the assets involved in the claim, and Plaintiff has not alleged that the various documents do not govern the relevant transactions. Accordingly, Plaintiff cannot maintain a claim for unjust enrichment. Furthermore, Plaintiff cannot maintain an unjust enrichment claim when she did not confer the benefit to those whom she claims are unjustly enriched. Finally, Plaintiff's unjust enrichment claim is subject to dismissal because she asserts only an independent claim for unjust enrichment, and not an alternative theory of recovery for a failed contract.

Therefore, Count I of Plaintiff's Amended Complaint as it relates to unjust enrichment is **DISMISSED WITH PREJUDICE.**

G. Constructive or Implied Trust.

In her equity claim, Plaintiff has requested the imposition of a constructive or implied trust over assets that passed under Mr. Russell's Will, assets that were transferred during Mr. Russell's life, and assets that automatically transferred at Mr. Russell's death under other instruments or by operation of law. A constructive trust is defined in O.C.G.A. § 53-12-132(a)

as "a trust implied whenever the circumstances are such that the person holding legal title to property, either from fraud or otherwise, cannot enjoy the beneficial interest in the property without violating some established principle of equity." The imposition of a constructive trust is "not an independent cause of action . . . but a device by which property might be recovered if [plaintiff's] unjust enrichment claim were to prevail." *St. Paul Mercury Ins. Co. v. Meeks*, 270 Ga. 136, 137 (1998). Because Plaintiff's claim for unjust enrichment must be dismissed, any derivative claim to relief in the form of a constructive trust also must be dismissed.

Plaintiff's request for a constructive trust also is subject to dismissal for failure to plead facts that would support imposition of a constructive trust. Plaintiff has not alleged that Defendants hold any of the assets to which she makes a claim by fraud or that any equitable principle should intervene and entitle her to a constructive trust. As noted above, this is not a case of fraud. Plaintiff's claim, at best, is a claim that she was deprived of assets under a mistaken belief that Donata, Jerome, and Michael were Mr. Russell's only biological children. Allegations such as these are insufficient to support a constructive trust claim. *See Pearlman v. Security Bank & Trust Co. of Albany*, 261 Ga. App. 270, 272 (2003) ("[Plaintiff] failed to demonstrate any fraud or show any other equitable principle which would entitle her to a constructive trust on the insurance proceeds.").

Accordingly, Count I of Plaintiff's Amended Complaint as it relates to the imposition of a constructive trust is **DISMISSED WITH PREJUDICE**.

IV. COUNT II OF THE AMENDED COMPLAINT: INJUNCTIVE RELIEF.

Count II of Plaintiff's Amended Complaint is a request for injunctive relief to enjoin Defendants: (1) "from transferring title to or for the benefit of themselves, except in the normal course of business, of any property that is (a) the subject of this lawsuit; or (b) controlled by any

of the documents comprising the 1993 Transactions or the 2013 Transactions" (Am. Compl. ¶ 217); and (2) "from paying the costs of defending this action using any property that is (a) the subject of this lawsuit, or (b) controlled by any of the documents comprising the 1993 Transactions or the 2013 Transactions" (*id.* at ¶ 218).

Because the remaining claims in Plaintiff's Amended Complaint are dismissed, Plaintiff's claim for injunctive relief during the pendency of this litigation is **DISMISSED AS MOOT.**

Even if any of Plaintiff's other claims were not subject to dismissal, Plaintiff's claim in Count II of her Amended Complaint for injunctive relief would still be subject to dismissal for failure to state a claim upon which relief can be granted. The purpose of an injunction is "to preserve the status quo of the parties pending a final adjudication of the case." *Bailey v. Buck*, 266 Ga. 405, 405–06 (1996) (citations omitted). *See Gerguis v. Statesboro HMA Med. Grp., LLC*, 331 Ga. App. 867, 868 (2015) (an injunction "should not be granted except in clear and urgent cases where there is a vital necessity to prevent a party from being damaged and left without a remedy") (citations omitted), *cert. denied* (July 6, 2015). In determining whether to grant injunctive relief:

> "a trial court generally must consider: (1) whether there exists a substantial threat that a moving party will suffer irreparable injury if the injunction is not granted; (2) whether the threatened injury to the moving party outweighs the threat and harm that the injunction may do to the party being enjoined; (3) whether there is a substantial likelihood that the moving party will prevail on the merits at trial; and (4) whether granting the interlocutory injunction will not disserve the public interest."

TMX Fin. Holdings, Inc. v. Drummond Fin. Servs., LLC, 300 Ga. 835, 836 (2017) ((quoting *Davis v. VCP South*, 297 Ga. 616, 621-22 (2015)).

"[I]n Georgia, in seeking injunctive relief a plaintiff must show that he is in great danger of suffering an imminent injury for which he does not have an adequate and complete remedy at law." *Am. Mgmt. Servs. East, LLC v. Fort Benning Family Cmtys., LLC*, 313 Ga. App. 124, 127 (2011) (citations omitted). Here, Plaintiff has not stated facts supporting a right to any such relief. Plaintiff argues she will be irreparably harmed unless this Court finds she is entitled to participate in the management of the businesses and partnerships established by Mr. Russell. As such, Plaintiff seeks to alter—not preserve—the status quo in requesting injunctive relief. Plaintiff's Amended Complaint expressly refers to the entities, companies, and partnerships as "owned or controlled by the Marital Russell Children" ((Am. Compl. ¶¶ 34, 64; *see id.* at ¶¶ 168 (entities "controlled" by "Marital Russell Children"), 206-208 ("entities owned and controlled by the Marital Russell Children").) Plaintiff also admits the status quo gives Defendants managerial and administrative input over companies identified in her Amended Complaint: "[t]he majority of the assets at issue here are ownership interests in various LLCs and partnerships over which Defendants have managerial and administrative input." (Pl's Consolidated Br. in Opp'n to Defs.' Mots. to Dismiss, at 46.) Plaintiff is not entitled to interfere with the status quo of how these businesses operate. *See DBL, Inc. v. Carson*, 262 Ga. App. 252, 256 (2003) (trial court erred in enjoining operation of marina pending final resolution of case where business had been operating for years); *Green v. Waddleton*, 288 Ga. App. 369, 371 (2007) (reversing the trial court's injunctions where "the trial court enjoined the operation of an enterprise that . . . had been in business . . . for several years . . . [t]he injunction does not preserve the status quo. . . ."). Plaintiff has not alleged facts as to why any urgency exists requiring a change to the existing status quo and, therefore, Plaintiff has failed to plead sufficiently a claim for injunctive relief.

With respect to Plaintiff's request to enjoin "Defendants from paying the costs of defending this action using any property that is (a) the subject of this lawsuit, or (b) controlled by any of the documents comprising the 1993 Transactions or the 2013 Transactions" (Am. Compl. ¶ 218.), when Defendants moved to dismiss this request of Plaintiff, Plaintiff did not respond to the argument. Therefore, Plaintiff has acquiesced by silence to dismissal of this portion of her claim for injunctive relief. *See Peterson v. Baumwell*, 202 Ga. App. 283, 285 (1991) ("failure to offer any opposition to [a] motion . . . constitutes an 'acquiescence by silence'") (citations omitted).

Furthermore, Plaintiff's request to enjoin "Defendants from paying the costs of defending this action using any property that is (a) the subject of this lawsuit, or (b) controlled by any of the documents comprising the 1993 Transactions or the 2013 Transactions" also fails to state a claim upon which relief may be granted. (*See* Am. Compl. ¶ 218.) Such an injunction would not only alter the status quo, but also interferes with the ongoing operation of businesses. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010) ("[A]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course."); *Sweeney v. Landings Ass'n, Inc.*, 277 Ga. 761, 762 (2004) (holding "[i]f the law and the facts make a final order in the plaintiff's favor unlikely, the interlocutory injunction can be denied based upon the inconvenience and harm to the defendant if it were granted").

Finally, and in addition to the bases for dismissal set forth above, Plaintiff has failed to allege that monetary recovery would not afford her an adequate and complete remedy. *McArthur Elec., Inc. v. Cobb County Sch. Dist.*, 281 Ga. 773, 774 (2007) (equitable relief is improper where a complainant has an adequate remedy at law); *Besser v. Rule*, 270 Ga. 473, 474 (1999)

(availability of money damages afforded complainant an adequate and complete remedy and precluded the entry of injunctive relief).

Accordingly, the entirety of Count II of Plaintiff's Amended Complaint is **DISMISSED WITH PREJUDICE.**

V. COUNT III OF THE AMENDED COMPLAINT: ATTORNEYS' FEES & COSTS.

Count III of Plaintiff's Amended Complaint is a request for attorneys' fees and costs pursuant to O.C.G.A. § 13-6-11. (Am. Compl. ¶ 220.) Because Plaintiff's claims for damages or other relief must all be dismissed, her derivative claim for attorneys' fees and costs pursuant to O.C.G.A. § 13-6-11 must also be dismissed. *See United Cos. Lending Corp. v. Peacock*, 267 Ga. 145, 146 (1996) ("A prerequisite to any award of attorney fees under O.C.G.A. § 13-6-11 is the award of damages or other relief on the underlying claim.").

Accordingly, the entirety of Count III of Plaintiff's Amended Complaint is **DISMISSED WITH PREJUDICE**.

VI. CONCLUSION.

Therefore, it is HEREBY ORDERED that Defendants' *Motion to Dismiss Verified Petition for Establishment of Heirship and Quantity of Interest and Complaint for Damages and Equitable Relief* is **GRANTED** and Plaintiff's *First Amended & Restated Complaint* is **DISMISSED WITH PREJUDICE**.

SO ORDERED this 9 day of January, 2019.

Eric K. Dunaway
Judge, Superior Court of Fulton County
Atlanta Judicial Circuit