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Landon T. Carlson

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v. First National Bank of Corsicana indicates a limitation of the *Beggs* case to situations where the benefits may be wholly used for either public or private purposes. Insofar as administration and enforcement are concerned, appointment of trustees where needed appears to be routine for the courts, and it would seem useless to question the power of courts of equity over charitable trusts or the authority of the Attorney General to invoke such power. In order to prevent failure of charitable trusts, the courts will apply the *cy pres* doctrine if a general charitable intent can be found.

Walter H. Magee.

CONSTRUCTIVE TRUSTS

IN GENERAL

RECENTLY, two Texas decisions were handed down involving constructive trusts. While neither decision contains anything startling, they do illustrate the wide application of the constructive trust doctrine. A few general observations concerning this doctrine would seem appropriate prior to discussion of these Texas cases.

Trusts have been classified as express and implied. Express trusts are composed of private and charitable trusts, whether testamentary or *inter vivos*. Implied trusts, comprising both resulting and constructive trusts, are imposed by law, sometimes contrary to intentions, upon property under a given set of facts and conditions. Constructive trusts are a remedial device, fashioned in equity, to undo wrongful acts and prevent unjust enrichment.

It is the usual rule that a constructive trust in land is not affected by the Statute of Frauds, being expressly excepted in the original statute.¹ The Texas Statute of Frauds omits mention of trusts in land, and express oral trusts arising at the time of a con-

¹ Chapt. VII, Chas. II c.3 (1676).

veyance, as well as implied trusts, were not affected by it.² The Texas Trust Act, passed in 1943, makes oral trusts in land unenforceable but provides that constructive and resulting trusts are excepted from the operation of the Act.³ The purpose of legislation making an oral agreement (contract or trust) concerning land unenforceable is to eliminate from the courts contests involving unreliable, perjured and conflicting oral evidence. The theory was that the statute will cause persons who intend a trust to put it in a writing and that absence of a writing generally will mean that no trust was ever intended. Exceptions to the statutes requiring trusts in land to be in writing were, perhaps, inevitable, and most of them were brought under the doctrine of constructive trusts. One may inquire as to the necessity for exceptions, as to the circumstances under which a constructive trust arises, and as to the nature of a constructive trust.

Briefly, as to necessity, it appears that there are always instances in which justice requires exceptions to statutory provisions—to prevent persons from obtaining advantages by their own wrongful acts and seeking to use the Statute of Frauds or other similar legislation to maintain their gains. Caution is essential in the use of the constructive trust, or its indiscriminate use would defeat the purpose of these statutes. Therefore, it would appear that two criteria underlie the propriety of its use. First, the case must be one in which unjust enrichment and wrongdoing are present. Second, the situation should be one in which the proof is reliable.

As to the circumstances causing a constructive trust to arise, it would seem that fraud, in its broadest sense, is the essential basis on which the courts have imposed a trust.⁴ Grounds upon

² TEX. REV. CIV. STAT. ANN (Vernon, 1925) art. 3995; *Johnson v. Smith*, 115 Tex. 193, 230 S. W. 158 (1926); and see *Leakey v. Gunter*, 25 Tex. 400, 403 (1860); *Bagley v. Pollock*, 19 S. W. (2d) 193 (Tex. Civ. App. 1929) (referring specifically to constructive trusts).

³ *Gray v. Mills*, 206 S. W. (2d) 278 (Tex. Civ. App. 1947), *affirmed*, _____ Tex. _____, 210 S. W. (2d) 985 (1948); TEX. REV. CIV. STAT. (Vernon, Supp. 1943) art. 7425b.

⁴ *Gregory v. Bowsby*, 115 Iowa 327, 88 N. W. 822 (1902), 126 Iowa 588, 102 N. W.

which the courts have sustained a constructive trust appear to be fraudulent misrepresentations,⁵ concealment,⁶ mistake,⁷ undue influence,⁸ duress,⁹ criminal misappropriation,¹⁰ breach of fiduciary relation or obligation,¹¹ breach of confidential relation,¹² and others. As was said in *McDonald v. Miller*:¹³

"A constructive trust will be imposed by a court in order to do equity and prevent unjust enrichment when title to property is acquired by fraud, duress, an undue influence, or is acquired or retained in violation of a fiduciary duty."

Judge Cardozo aptly defined a constructive trust in *Beatty v. Gugenheim Exploration Company*:¹⁴

"A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee."

It should be remembered that such a trust arises by operation of law—imposed by law upon the wrongdoer in favor of the wronged

517 (1905). (This case in general is concerned with the necessity of some positive fraud being present.)

⁵ *Faville v. Robinson*, 111 Tex. 48, 227 S. W. 938 (1919).

⁶ *Jones v. Lynch*, 137 S. W. 395 (Tex. Civ. App. 1911).

⁷ See *Biggs v. Poling*, 134 S. W. (2d) 801 (Tex. Civ. App. 1939) writ of error dismissed, judgment correct; *Simmons v. Wilson*, 216 S. W. (2d) 847 (Tex. Civ. App. 1949) (a very recent application of the rule where mistake was present).

⁸ *Andrews v. Brown*, 10 S. W. (2d) 707 (Tex. Civ. App. 1928), affirming with directions 283 S. W. 288 (Tex. Civ. App. 1926).

⁹ *Pope v. Garrett*, _____ Tex. _____, 211 S. W. (2d) 559 (1948); *Day v. Mallard*, 228 S. W. 164 (Tex. Com. App. 1921), affirming *Mallard v. Day*, 204 S. W. 245 (Tex. Civ. App. 1918).

¹⁰ *First State Bank of Ellinger v. Zelesky*, 262 S. W. 190 (Tex. Civ. App. 1924).

¹¹ *Edwards v. Strong*, _____ Tex. _____, 213 S. W. (2d) 979 (1948); *Berry v. Rhine*, 205 S. W. (2d) 632 (Tex. Civ. App. 1947).

¹² *Gray v. Mills*, 206 S. W. (2d) 278 (Tex. Civ. App. 1947), affirmed, _____ Tex. _____, 210 S. W. (2d) 985 (1948); *Collins v. Griffith*, 105 S. W. (2d) 895 (Tex. Civ. App. 1937); *Krenz v. Strohmeir*, 177 S. W. 178 (Tex. Civ. App. 1915) writ of error refused; *Landrum v. Landrum*, 62 Tex. Civ. App. 43, 130 S. W. 907 (1910) writ of error refused; *Sinclair v. Purdy*, 235 N. Y. 245, 139 N. E. 255 (1923).

¹³ 73 N. D. 474, 16 N. W. (2d) 270, 272 (1944).

¹⁴ 255 N. Y. 380, 122 N. E. 378, 380 (1919).

—regardless of the intentions of the parties involved.¹⁵ This is the distinguishing feature from other types of trusts; courts sometimes use the expressions “resulting trusts” and “constructive trusts” indiscriminately, when, in fact, the former has present an element of intent to create a beneficial interest.

As to the nature of a constructive trust, it appears that the *cestui que trust* acquires not merely an equitable right, but equitable title in the property.¹⁶ And such trust arises at the time legal title is obtained by the “trustee.”¹⁷ A purchaser of the property from the wrongdoer, for value, in good faith and without notice, will cut off the equitable title of the rightful owner.¹⁸

Regarding the matter of application of the foregoing general observations, two recent Texas cases appear to be in accord with the results reached in most jurisdictions.

DURESS OR FRAUD

In the recent case of *Pope v. Garrett*¹⁹ the deceased, Carrie Simons, had indicated to her neighbor that she wished a will drawn up in which all her property was to pass to the plaintiff. Since the decedent was in poor physical health, the neighbor drew up the will according to her wishes. The neighbor presented it to her, after reading it aloud in the presence of decedent, a minister, a friend of the plaintiff, a sister of decedent, two nieces of decedent, and another. Immediately after the reading, in the presence of all these witnesses, decedent declared that this was to be her last will and testament. The jury found that a sister and a niece “by physical force or by creating a disturbance” prevented the

¹⁵ See *Magee v. Young*, 145 Tex. 485, 198 S. W. (2d) 883 (1947); *Tex. Creosoting Co. v. Hartburg Lumber Co.*, 12 S. W. (2d) 169 (Tex. Com. App. 1929); *Spencer v. Pettit*, 17 S. W. (2d) 1102 (Tex. Civ. App. 1929), *affirmed*, 34 S. W. (2d) 798 (Tex. Com. App. 1931).

¹⁶ *Snyder v. Citizens State Bank*, 184 S. W. (2d) 684 (Tex. Civ. App. 1944), *affirmed*, *Binford v. Snyder*, 144 Tex. 134, 189 S. W. (2d) 471 (1945).

¹⁷ See *Elbert v. Waples-Platter Co.*, 156 S. W. (2d) 146 (Tex. Civ. App. 1941) *writ of error refused*.

¹⁸ See *Texas Co. v. Miller*, 165 F. (2d) 111 (C. C. A. 5th 1947).

¹⁹ ___ Tex. ___, 211 S. W. (2d) 559 (1948).

signing of the will by decedent, and a few days afterwards she died. Upon suit by plaintiff, the intended taker under the will, against the heirs of the decedent, two questions presented themselves: 1) whether there should be a trust imposed or impressed upon all the property intended for the plaintiff under the terms of the will, and, 2) whether, if the trust imposition was appropriate, it should be impressed upon the property inherited by *all* the heirs, or only upon the property of those persons preventing the execution of the will.

It was held, as to the first question, that this was a typical situation in which the courts would impose a trust upon property received by persons through fraud or other wrongful acts and would allow the person rightfully entitled to the property to receive the beneficial interest therein as beneficiary of a constructive trust. As to the second question, there was no question that the two persons participating in the duress should not be allowed to retain the property inherited. With respect to the other heirs, who were innocent of the wrongdoing, the court noted a conflict in legal opinion and held that they, too, should not be entitled to profit by the wrongdoing of others.

It is to be reiterated that the general rule is that persons participating in fraud, duress, and other wrongful actions, and obtaining legal title to property will be deemed trustees for the persons who rightfully should have received the same.²⁰ Incidentally, it should be noted that there are cases holding that where a person is prevented from receiving a bequest through such efforts of another, who has profited thereby, the latter may be proceeded against in an action in tort.²¹

As to the second question in the case, the court recognizes the conflict of authority, but agrees with the more modern cases as well

²⁰ *Ransdel v. Moore*, 153 Ind. 393, 53 N. E. 767 (1899); *Dixon v. Olmius*, Chancery, 1 Cox. Eq. 414 (1787); RESTATEMENT, RESTITUTION, § 166, and Comment "f," § 184 (1937) and illustrations thereunder; 3 SCOTT, THE LAW OF TRUSTS, § 489.4, 2371, 2372 (1939).

²¹ In general, see note, 98 A. L. R. 474 (1935).

as the current legal writers. In the minority and older view, a distinction is drawn between persons taking by joint tenancy and persons taking as tenants in common. Where the promise to (or fraud upon) the testator is made by one of joint tenants, all those benefiting hold in trust for the person who should have received the benefice. But where one tenant in common has perpetrated the fraudulent devise to all, the others being innocent, then only the wrongdoer is made a trustee of the property he has received.²² In the principal case the innocent heirs, though taking as tenants in common through statute, were made trustees of the property they received. In accord with this view Bogert argues that if the transaction could be made safe from a constructive trust by having some apparently innocent relative receive the benefits, the wrongdoer would indirectly benefit where collusion is present.²³ And Scott argues that the conflict is between the principles of unjust enrichment and of enforcement of the Statute of Wills and believes that the Statute of Wills should not be without exception. He takes the position that innocent takers ought to hold in trust for the person justly entitled, had the fraud not taken place.²⁴ The *Restatement of the Law of Restitution*²⁵ states, regarding property fraudulently acquired through a will, or lack thereof:

“... In such a case [where the fraud is by a third person] the devisee or legatee would be unjustly enriched if he were permitted to take and hold the property, even though he had no notice of the wrongful means by which the devise or bequest was procured. . . . The situation is in substance the same as though the third person had by fraud, duress, . . . obtained a devise . . . to himself and had gratuitously transferred it to another.”

²² Powell v. Yearance, 73 N. J. Eq. 117, 67 Atl. 892 (1907); Heinisch v. Pennington, 73 N. J. Eq. 456, 68 Atl. 233 (1907).

²³ 3 BOCERT, TRUSTS AND TRUSTEES, Part I, 26 (1946 Ed).

²⁴ 3 SCOTT, *op. cit. supra* note 20, § 489.4, 2375; *Contra*: Dye v. Parker, 108 Kan. 304, 194 Pac. 640 (1921) (where Statute of Wills prevailed and the innocent retained free of trust imposition).

²⁵ Comment “j,” § 184, 752; and see Illustrations numbered 17 and 18 under this comment, same page.

The Texas Supreme Court noted the argument that those who were not parties to the wrongdoing would be injured by the decree declaring them, as well as the wrongdoers, trustees for the plaintiff. But, the Court answered, why allow the plaintiff to receive less than was intended by the decedent, and why not allow plaintiff the complete relief which the court of equity can decree? Further, it should be noticed that in the principal case there was ample evidence of disinterested witnesses to take the element of uncertainty out of the holding and to observe necessary caution in employing a constructive trust as the remedy.

BREACH OF FIDUCIARY RELATIONSHIP

*Edwards v. Strong*²⁶ is a good example of a constructive trust imposed upon the legal title to property which an agent, and others acting with him, had acquired in breach of a fiduciary relationship. Mrs. Strong had employed one Athans to acquire an option to a "key" lot from Griffin, the owner of the lot. The option was acquired, but in Athans' name, and a short time later, within the option period, the Edwards bought the lot in their own names from Athans, the purchasers having knowledge of the transaction between plaintiff and Athans. Suit followed by Mrs. Strong to have them declared constructive trustees of the lot in her favor. Defendants argued that, since the option was oral in the first instance and could not be enforced under the Statute of Frauds against the lot owner, therefore it should not be enforced in court at this time; defendants also argued that the agency employment was oral and could not be enforced.

It was held that the unenforceability of the option with Griffin, the lot owner, made no difference as to plaintiff, since Griffin had conveyed the lot in question to the defendants. Further, it would seem that this defense was a personal one for Griffin and not available to defendants. The court then imposed a constructive trust upon the legal title acquired by defendants, basing said trust upon

²⁶ ___Tex___, 213 S. W. (2d) 979 (1948).

the agent's (Athans') breach of fiduciary relationship and upon the Edwards' participation therein. The court also stated that the defense that the agency contract was not in writing was waived by defendants, they having raised this objection for the first time upon appeal.

Where an oral contract to convey an interest in land is breached and the prospective buyer seeks to enforce the contract by specific performance or by imposition of a trust, the general rule is that relief is denied because of the Statute of Frauds.²⁷ And where there is a parol agreement between the litigants to share in the profits of a sale of a farm, defendants to purchase and sell the same, there is no basis for a constructive trust, for the same reason.²⁸ However, the situation is different where an agent breaches a pre-existing fiduciary relationship with his principal.²⁹

It would appear that the modern rule is that where one person is in a fiduciary relation to another and obtains property in violation of such duty, that person will be held to be a constructive trustee of the property for his principal.³⁰ But it is well to note the possible variations which Bogert points out regarding the agency relationship:³¹

1) where there is an agency relationship by contract between two persons and the agent is to negotiate with the land owner (the situation of the principal case);

2) where there is an agency contract, and the principal previously had a contract with the land owner, and the agent has only to complete the details. Here the principal already has equitable title and can enforce the agreement against his agent should the latter procure a conveyance to himself;

²⁷ *Bentley v. Young*, 147 Ga. 373, 94 S. E. 221 (1917); *Modern Baking Co. v. Oringer*, 271 Pa. 152, 114 Atl. 264 (1921); 3 BOGERT, *op. cit. supra* note 23, § 479, 60.

²⁸ *Purvis v. Hardin*, 343 Mo. 652, 122 S. W. (2d) 936 (1938).

²⁹ *Kinzbach Tool Company v. Corbett-Wallace Corporation*, 138 Tex. 565, 160 S. W. (2d) 509 (1942).

³⁰ RESTATEMENT, RESTITUTION, § 190 generally, and § 194 (1) and (2) specifically (1937).

³¹ 3 BOGERT, *op. cit. supra* note 23, § 487, 122-127.

3) where the agency contract is present, but the *agent* previously had a contract with the land owner. Here, it would appear that the agency contract would be regarding a land interest conveyance (the principal knowing of the agent's contract with the land owner) bringing it within the Statute of Frauds.

As to the first situation, there appear to be two lines of authority. The older, and probably the minority, view would refuse to allow a constructive trust to be imposed upon the agent, when there is no writing to show such agency relationship, on the ground that such a contract is within the Statute of Frauds.³² The other view, and seemingly the majority, treats the situation from the breach of agency standpoint—breach of fiduciary relations, or trust and confidence—and imposes a constructive trust upon the property acquired by the agent in favor of his principal.³³ The *Restatement of the Law of Restitution*³⁴ recognizes the argument regarding the Statute of Frauds but dismisses it by saying that the enforcement is not of the oral promise or undertaking but of the breach of fiduciary obligation. Bogert argues along the same lines that since the contract is that the agent will *procure* the transfer of land from a third person and not that the agent himself will convey the property to his principal, such transaction does not come within the Statute of Frauds.³⁵ The modern rule, applicable to the principal case, is also stated in the *Restatement of the Law of Agency*.³⁶

³² *Mitchell v. Wright*, 155 Ala. 458, 46 So. 473 (1908); *Day v. Amburgey*, 147 Ky. 123, 143 S. W. 1033 (1912); *Dougan v. Bemis*, 95 Minn. 220, 103 N. W. 882 (1905).

³³ *Magnolia Pet. Co. v. Taylor*, 173 S. W. (2d) 969 (Tex. Civ. App. 1943) *writ of error refused*; *Johnson v. Hayward*, 103 N. W. 1058, 74 Neb. 157, 107 N. W. 384 (1906).

³⁴ Comment "d," § 194, 798: "Where one person orally undertakes to purchase land on behalf of another, it may be urged that the other cannot enforce a constructive trust because the undertaking is oral and there is no compliance with the provisions of the Statute of Frauds. The answer to this objection is that the other is not enforcing an oral contract, but is enforcing a constructive trust based upon the violation of fiduciary duty... the relation may arise although its creation is not evidenced by a written instrument, even though the agent is to purchase land for his principal." Should the agent buy for himself, then he holds the property in constructive trust for his principal. But this, the *Restatement* adds, is applicable only where he undertakes to buy as agent for the other.

³⁵ 3 BOCERT, *op. cit. supra* note 23, § 487, 126.

³⁶ § 414 (2), and the Illustrations under Comment on Subsection (2) with nearly the same facts as in the principal case.