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NOTES AND COMMENTS

CONSTRUCTIVE TRUSTS UNDER THE TEXAS TRUST ACT

THE enactment of the Texas Trust Act¹ in 1943 presented to the courts of this state for the first time the problem of clearly distinguishing between express trusts in realty created by an agreement between the parties and trusts in land implied by law regardless of the intention of the parties to prevent the unjust enrichment of a person who wrongfully holds title to real property.² As the Trust Act was originally worded,³ there was some doubt as to whether or not the requirement that a trust of real property be evidenced by a written memorandum⁴ applied to both express and implied trusts.⁵ The Trust Act was amended by the next session of the Legislature, however, to make it clear that the Trust Act did not apply to constructive or resulting trusts.⁶

Prior to the Trust Act, Texas had no statutory provisions similar to the seventh, eighth, and ninth sections of the English Statute of Frauds.⁷ Oral trusts in land were enforceable if they were

¹ TEX. REV. CIV. STAT. (Vernon, 1948) art. 7425b.

² 3 BOCERT, TRUSTS AND TRUSTEES (1935) § 471 *et seq.*; 3 SCOTT, THE LAW OF TRUSTS (1939) § 462 *et seq.*; RESTATEMENT, RESTITUTION (1937) § 160 *et seq.*; 54 AM. JUR., *Trusts*, § 218 *et seq.*

³ "Sec. 2. *Definition of trust.* 'Trust' for the purposes of this Act, means an express trust only, and does not include so-called 'business trusts'." Acts 1943, c. 148, p. 232.

⁴ TEX. REV. CIV. STAT. (Vernon, 1948) art. 7425b-7.

⁵ Moorhead, *The Texas Trust Act*, 22 Tex. L. Rev. 123, 131 (1944).

⁶ TEX. REV. CIV. STAT. (Vernon, 1948) art. 7425b-2 now reads: "*Definition of trust.* 'Trust' for the purpose of this Act means an express trust only, and does not include (1) resulting or constructive trusts..." Acts 1943, c. 148, § 2, p. 232, as amended, Acts 1945, c. 77, § 1, p. 109. See Note, 23 Tex. L. Rev. 374 (1945).

⁷ "The 7th Section provides that all declarations or creations of trusts or confidences in any lands, tenements, or hereditaments shall be manifested or proved by some writing signed by the party who is enabled by law to declare such trust, etc.

"The 8th Section declares that all trusts or confidences of lands, or tenements, which arise or result by the implication or construction of law, or are transferred by an act or operation of law, shall be of the like force and effect, as if the statute had not been made.

"The 9th, [*sic*] requires that all grants and assignments of any trust or confidences,

based on agreements contemporaneous with an *inter vivos* transfer of legal title, but self-declarations of trusts by persons already having legal title were not enforceable unless they were evidenced by written instruments.⁸ The former type of express trust was not considered to be within the provisions of the Statute of Frauds that had at that time been adopted in this state because it was held that the written instrument transferring legal title to the property satisfied the requirement of the statute.⁹ The latter type of express trusts was, however, considered to be an oral conveyance or contract for the sale of land unenforceable because of the Statute of Conveyancing¹⁰ or the Statute of Frauds.¹¹ Since no instrument in writing was required to create a trust in land agreed to at the time of a transfer of title—a situation which arose frequently before the passage of the Trust Act—parol evidence was admissible to prove most express and implied trusts in land;¹² therefore, it was not necessary for the courts to distinguish between express and implied trusts in particular cases.¹³ This failure of the courts to spell out the type of trust which they were enforcing in cases decided prior to the Trust Act has resulted in considerable difficulty in applying those cases¹⁴ to transactions occurring after the passage of the Act. Since the enactment of the Trust Act, the Texas Supreme Court has imposed constructive

shall likewise be in writing, or be utterly void and of none effect." *James v. Fulcrad*, 5 Tex. 512, 517 (1851).

⁸ Huie, *The Community Property Law of Texas*, VERNON'S TEX. CIV. STAT. ANN., v. 13 (1951), pp. VII, XII.

⁹ *Allen v. Allen*, 101 Tex. 362, 197 S. W. 528 (1908).

¹⁰ TEX. REV. CIV. STAT. (Vernon, 1948) art. 1288.

¹¹ TEX. REV. CIV. STAT. (Vernon, 1948) art. 3995.

¹² "We need not determine, therefore, whether the trust established by the evidence... was a constructive trust or an express trust, for prior to the effective date of that act parol evidence was admissible to establish either." *Sevine v. Heissner*, 148 Tex. 345, 349, 224 S. W. 2d 184, 186 (1949), *rev'g* 220 S. W. 2d 704 (Tex. Civ. App. 1949).

¹³ *Fitz-Gerald v. Hull*,Tex....., 237 S. W. 2d 256, 260 (1951).

¹⁴ For a review of the cases prior to the Trust Act, see Guittard, *Express Oral Trusts of Land in Texas*, 21 Tex. L. Rev. 719 (1943).

trusts in some situations,¹⁵ and has refused to do so in other situations,¹⁶ without having been compelled to consider the effect of the Act, if any, on implied trusts. Several cases, however, declare that the Trust Act is not applicable to transactions out of which trusts arose prior to the date of the enactment of the statute.¹⁷

A constructive trust has probably been best defined by Mr. Justice Cardozo in these words:

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.¹⁸

Although the distinction between express and constructive trusts appears to be clear,¹⁹ the courts experience difficulty in making it in cases involving an abuse of a confidential relationship. A constructive trust is not a "fiduciary relationship," as is an express trust, but one type of situation which gives rise to a constructive trust involves the abuse of "confidential relationship," which may or may not be a "fiduciary relationship."²⁰ In both express and implied trusts the person who has the legal title to the property in question is under an equitable duty to deal with the property for the benefit of another person, but this is the extent of the similarity between the two types of trusts.²¹ An express trust is a result of the intention of the parties, whereas a constructive trust is imposed by the courts to prevent the unjust enrichment of a party

¹⁵ *Cecil v. Dollar*, 147 Tex. 541, 218 S. W. 2d 448 (1949); *Edwards v. Strong*, 147 Tex. 155, 213 S. W. 2d 979 (1948); *Pope v. Carrett*, 147 Tex. 18, 211 S. W. 2d 559 (1948).

¹⁶ *Paddock v. Siemoneit*, 147 Tex. 571, 218 S. W. 2d 428 (1949); *Warner v. Winn*, 145 Tex. 302, 197 S. W. 2d 338 (1946).

¹⁷ *Sevine v. Heissner*, 148 Tex. 345, 224 S. W. 2d 184 (1949); *Binford v. Snyder*, 144 Tex. 134, 189 S. W. 2d 471 (1945); *Dickens v. Dickens* 241 S. W. 2d 658 (Tex. Civ. App. 1951) *er. ref. n.r.e.*; *Smith v. Dean*, 240 S. W. 2d 789 (Tex. Civ. App. 1951); *Hueschen v. Dunn*, 219 S. W. 2d 587 (Tex. Civ. App. 1949).

¹⁸ *Beatty v. Guggenheim Exploration Co.*, 225 N. Y. 380, 122 N. E. 378, 380 (1949).

¹⁹ *Scott, op. cit. supra* note 2, § 462.1.

²⁰ *Ibid.*

²¹ *Ibid.*

who has breached a confidential relationship in regard to the property.²² A constructive trust is said to relate back to the time of the breach of the confidential relationship, but the only duty of the trustee is to convey the property to the person in whose favor a constructive trust is imposed by the court. Actually, no trust is created by the court, but a constructive trust is the means by which title to the property in question is vested or reinvested in the person who is equitably entitled to it.²³

The first important case in which the Supreme Court of Texas considered the effect of the Texas Trust Act on the use of the equitable device of a constructive trust was *Mills v. Gray*.²⁴ There a husband and wife conveyed property to the wife's son to facilitate a property settlement prior to obtaining a divorce, the conveyance being subject to an oral promise by the son that he would reconvey to the wife and her other children after the divorce, or divide the proceeds upon a sale. The property was sold and the proceeds used to purchase other property with the consent of the wife, who contended that title to the property purchased was to be taken in her name. Instead, the son took title to the property in his own name and refused to perform his promise to convey the property to his mother and the other children. In a suit to impress a constructive trust, the trial court ruled that evidence of the agreement was inadmissible because of the parol evidence rule. The supreme court, however, held that the parol evidence rule would not prevent the imposition of a constructive trust on the property in the son's hands. Quoting from the *Restatement of Trusts*,²⁵ the court decided that the requirement of the Trust Act

²² *Ibid.*

²³ *Id.*, § 462.4.

²⁴ 147 Tex. 33, 210 S. W. 2d 985 (1948), *aff g* 206 S. W. 2d 278 (Tex. Civ. App. 1947).

²⁵ "§ 44. Effect of Failure of Oral Trust for Settlor.

"(1) Where the owner of an interest in land transfers it inter vivos to another in trust for the transferor, but no memorandum properly evidencing the intention to create a trust is signed, and the transferee refuses to perform the trust, the transferee holds the interest upon a constructive trust for the transferor, if . . .

"(b) the transferee at the time of the transfer was in a confidential relation to the transferor. . . ." *Id.* at 38, 210 S. W. 2d at 988.

that express trusts in land be evidenced by a written instrument did not prevent the imposition of a constructive trust where there had been an abuse of a confidential relationship existing prior to the conveyance.²⁶ The court said:

... [I]f the purported agreement and family arrangement had been established as true, a constructive trust would have arisen by reason of the confidential relation between the parties which would not fall within the prohibition of the Statute of Frauds or the Texas Trust Act. The testimony was therefore erroneously excluded by the trial court.²⁷

The supreme court subsequently decided *Edwards v. Strong*.²⁸ The broker defendant had contracted orally to secure an option to purchase property as plaintiff's agent. After the broker acquired the option in his own name, he and other defendants, who had notice of his fiduciary relationship to plaintiff, purchased the property in the name of one of the other defendants. In their suit to establish a constructive trust in plaintiff's favor, plaintiff and her husband tendered into the court the full purchase price which defendants paid for the property. The supreme court held that the trial court was correct in imposing a constructive trust although the option contract with the vendor was unenforceable because it was not in writing.²⁹ The court said:

The respondents' right to enforce a constructive trust arises out of the breach by Athans [the broker] of his fiduciary duty and the knowing participation therein by the Edwardses [the other defendants] and the unjust enrichment which would result to the Edwardses, if they were permitted to retain the land.³⁰

The indication of *Mills v. Gray* that the Texas courts would be inclined to impose a constructive trust where the equities of the situation demanded, regardless of the requirements of the Trust

²⁶ See Note, 27 Tex. L. Rev. 399 (1949).

²⁷ 147 Tex. at 40, 210 S. W. 2d at 989.

²⁸ 147 Tex. 155, 213 S. W. 2d 979 (1948), *aff'g* 297 S. W. 2d 655 (Tex. Civ. App. 1947). See Note, 3 Southwestern L. J. 175, 181 (1949).

²⁹ TEX. REV. CIV. STAT. (Vernon, 1948) art. 3995.

³⁰ 147 Tex. at 158, 213 S. W. 2d at 981.

Act, seems to have been confirmed in *Fitz-Gerald v. Hull*.³¹ This decision is probably the most important case concerning constructive trusts decided since the enactment of the Texas Trust Act. Plaintiffs Hull and Green and defendant Fitz-Gerald were friends of long standing. They entered into an oral, coffee-cup agreement that plaintiffs, who were oil company employees, would furnish information concerning potentially productive oil and gas properties and that defendant, who was a drilling contractor, would acquire an oil and gas lease on a selected tract of land in the names of the three parties, who would share the profit or loss from its development. Contrary to this agreement, defendant acquired a lease on the tract selected in his own name and, after the property had proved to be highly productive, denied that plaintiffs had any interest in the lease. The trial court directed a verdict against the plaintiffs in their suit to establish a constructive trust, being of the opinion that the agreement was an attempt to create an express oral trust in land in contravention of the Trust Act. The supreme court held that the provision of the Trust Act requiring a writing to establish an express trust in land was not applicable to the agreement between the parties,³² and that the facts of the case called for the imposition of a constructive trust because defendant had abused the confidential relationship existing between the parties³³ as a result of their agreement to engage in a joint venture.³⁴ The majority of the court said:

This trust arose not because there was any agreement for the title to be taken in the name of petitioner [defendant], and the property to be held by him in trust for the respondents [plaintiffs]—as would be necessary to constitute an express trust—but, because under the facts, equity would raise the trust to protect the rights of the respondents,

³¹Tex....., 237 S. W. 2d 256 (1951), *aff'g* 232 S. W. 2d 93 (Tex. Civ. App. 1950). Justice Garwood concurred in a separate opinion, Justice Smedley dissented, and Justice Wilson did not participate.

³² *Cf.* *Newton v. Gardner*, 225 S. W. 2d 598 (Tex. Civ. App. 1949) *er. ref. n.r.e.*, and *Klein v. Sibley*, 203 S. W. 2d 239 (Tex. Civ. App. 1947).

³³ Citing 54 AM. JUR., *Trusts*, §§ 225-228.

³⁴ Citing 30 AM. JUR., *Joint Adventurers*, § 34.

and to prevent the unjust enrichment of petitioner by his violation of his promise and duty to the respondents to take title in the name of the three of them, and for their mutual profit and advantage. . . .

We see that the state of facts we have in the instant case does not come within any of the . . . "means or methods" whereby an express trust may be created under the terms of the Trust Act. Therefore, such Trust Act cannot apply to our case, and we do not have an express trust present. . . .

The pleadings and proof show that the three parties agreed to enter into a joint adventure regarding this oil and gas lease and that each had a duty to perform to further the common interest. In carrying out this common interest each joint adventurer owed the highest duty to the other so to act as to further their joint interest, and each was an agent of the other. The petitioner violated this duty in taking the title in his own name, and seeking to appropriate all the profits to his own use and benefit. Equity will force him to disgorge and to divide his gains with the other joint adventurers in accordance with their original agreement.³⁵

A dissenting opinion took issue with the majority opinion primarily because the majority based its decision on the fact that the agreement was that title to the lease was to be taken in the names of all three parties rather than in the name of defendant in trust for plaintiffs. The dissenting justice was of the opinion that this was a distinction without substance, as the contemplated result in either event would be that defendant would acquire the lease for the benefit of himself and plaintiffs. The dissenting justice also disagreed with the majority determination that the oral agreement was to engage in a joint adventure which gave rise to a fiduciary relationship between the parties, being of the opinion that there was only an oral promise to buy land for others, which did not give rise to a confidential relationship.³⁶ He was also of the opinion that there was no proof of such equities in plaintiffs' favor as would warrant the use of a constructive trust. Although he recognized that there were exceptions to the principle that constructive

³⁵ 237 S. W. 2d at 259, 261, 264.

³⁶ Citing 54 AM. JUR., *Trusts*, § 48; Note, 42 A. L. R. 10 (1926), supplemented by 135 A. L. R. 232 (1941).

trusts are used primarily for the purpose of restitution,³⁷ he concluded:

If under the facts of this case the prohibition of the statute [Article 7425b-7] can be avoided, then it is difficult to conceive of any case in which effect can be given to that part of the statute, and if the opinion of the majority stands, the law of this state with respect to parol trusts in realty will be substantially the same as it was before the enactment of the Texas Trust Act.³⁸

This conclusion of the dissenting opinion seems to be warranted by the cases, but the result reached by the majority opinion appears to be desirable. Although the distinction upon which the majority opinion based its decision is questionable, a principal point of conflict was whether there had been a showing that the oral agreement in question created a confidential relationship between the parties which had been abused by the defendant.³⁹

Fitz-Gerald v. Hull was followed in the later case of *Schiller v. Elick*,⁴⁰ where the plaintiff brought suit to impose a constructive trust on a one-fourth mineral interest in land which defendant allegedly sold as the agent of plaintiff and her husband. Defendant, who claimed to have been a purchaser in an arm's-length transaction, was alleged to have informed plaintiff and her husband that a purchaser was willing to buy the land with a one-half mineral interest reserved by the vendors. Subject to this reservation, the property was deeded to defendant, who conveyed it to the ultimate purchaser the same day, reserving a one-fourth mineral interest in himself. The court decreed that defendant held the one-fourth mineral interest in constructive trust for plaintiff, as he

³⁷ 237 S. W. 2d at 270, 271, citing RESTATEMENT, RESTITUTION (1937) § 160. Section 194 provides: "(2) A person who agrees with another to purchase property on behalf of the other and purchases the property for himself individually holds it upon a constructive trust for the other, even though he is not under a duty to purchase the property for the other."

³⁸ 237 S. W. 2d at 273.

³⁹ See *infra* note 48.

⁴⁰Tex....., 240 S. W. 2d 997 (1951), *rev'g* 235 S. W. 2d 494 (Tex. Civ. App. 1950).

had violated his fiduciary duty to plaintiff and her husband by not informing them that the purchaser was willing to buy the land with only a one-fourth mineral interest. The court said:

It might be argued that this holding imposes a higher standard of business ethics upon the parties to a real-estate transaction than the law has a right to expect. The growth of the law has been consistently towards higher ethical standards. . . . Extending the term "fiduciary" beyond formal relationships (as, for example, guardian and ward) widens the possibility of attack by perjury upon legal instruments, but this has been determined as not controlling in *Fitz-Gerald v. Hull*, *supra*, and cases there cited.⁴¹

The decisions of the Texas courts are following the modern tendency of a broad construction of the term "confidential relationship" rather than limiting it to strict fiduciary relationships.⁴² They are also construing the word "fraud" in the broader sense of the term "constructive fraud."⁴³ Although the general rule and Texas rule are that agreements to hold land in trust must be in writing to be enforceable,⁴⁴ the tendency is to limit this rule to arm's-length transactions and to impose constructive trusts in those cases where there is clear and convincing proof of the abuse of an antecedent confidential relationship between the parties.⁴⁵

The problem involved in cases where a person seeks to impose a constructive trust in land because there has been a breach of a confidential relationship is primarily one of whether the policy underlying the Statute of Frauds should prevail over the policy upon which the equitable doctrine of preventing unjust enrichment is based. The Statute of Frauds was enacted to avoid adjudication of interests in land on the basis of conflicting and perjured oral testimony. It was recognized that the courts in many instances could only guess which litigant and witnesses, if any, were telling

⁴¹ 240 S. W. 2d at 1001.

⁴² See authorities cited in 54 AM. JUR., *Trusts*, §§ 225-228.

⁴³ See Note, 159 A. L. R. 1007 (1945), supplementing Notes in 129 A. L. R. 689 (1940), 159 A. L. R. 195 (1932), 45 A. L. R. 815 (1926) and 35 A. L. R. 280 (1925).

⁴⁴ See authorities cited in 54 AM. JUR., *Trusts*, § 54 *et seq.*

⁴⁵ See, for example, *Kochorimbus v. Maggos*, 323 Ill. 510, 154 N. E. 235 (1926).

the truth. The requirement of a writing goes far to insure that the actual agreement of the parties can be accurately determined and spurious claims to title thwarted. When a legislative enactment provides that failure to reduce an agreement concerning land to writing will result in the attendant penalty of unenforceability, it is fair to assume that in a short time persons entering into such an agreement will be careful to reduce it to writing. Within a reasonable time one may infer that where an agreement is really made, it will be expressed in some sort of written memorandum and that non-existence of a writing means that no agreement was made. Strict adherence to the Statute of Frauds by the courts will avoid guesswork by the courts on conflicting oral testimony, eliminate a prolific cause of litigation, and will eventually lead to a situation where one can be confident that the only trusts actually agreed upon are those which are put in writing. Thus, stability and security of land titles as expressed in writing will be protected.

On the other hand, one must admit that people persist in making oral agreements concerning land even in jurisdictions where the Statute of Frauds has been in effect for generations, and unscrupulous individuals seek to take advantage of the provisions of the Statute of Frauds to defraud innocent and confiding persons. The exigencies of the modern business world dictate that many transactions be conducted informally, and justice demands that the legal requirement of formality be disregarded in some situations in order to reach an equitable result. Judicial concern for the innocent and unwary must, however, be circumscribed by the requirement that the equities of the party seeking to have a constructive trust imposed be established by clear and convincing proof.

The conclusion has been stated that "in many of the situations where an oral express trust was enforced prior to the Act, the courts will be able to reach the same result now by classifying the trust as resulting or constructive."⁴⁶ This conclusion seems to be

⁴⁶ Huie, *op. cit. supra* note 9, p. XII.

correct in the light of the cases decided since the enactment of the Trust Act, particularly *Fitz-Gerald v. Hull*. In fact, the cases indicate that the imposition of a constructive trust is not necessarily precluded even though the court determines that there was an attempted creation of an express oral trust in land in contravention of the Trust Act.⁴⁷ Before a constructive trust will be imposed in such a case, however, there will have to be a showing of an abuse of an antecedent confidential relation between the parties to the oral trust. This is the ultimate issue in this type of cases. There is always the possibility of a dismissal of such a case where insufficient facts are alleged to raise an issue as to the existence of a confidential relationship, or of a directed verdict where there is insufficient evidence to establish such a relationship.⁴⁸ The only effect of the Trust Act on the imposition of constructive trusts would seem to be that the possibility of such a trust being implied by the court is precluded where there was an attempt to create an express oral trust in land in an arm's-length transaction and there was no previous confidential relationship between the parties. All cases involving implied trusts necessarily rest on their particular facts, and no hard and fast rules to govern such cases can be laid down. This is the thesis stated by Mr. Justice Cardozo:

A court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of relief.⁴⁹

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⁴⁷ It appears to be immaterial whether the person against whom the constructive trust is imposed was guilty of fraud at the time he acquired title to the property in question. See 1 SCOTT, *op. cit. supra* note 2, § 44.2.

⁴⁸ See *Mellette v. Hudstan Oil Corp.*, 243 S. W. 2d 438 (Tex. Civ. App. 1951), where the direction of a verdict against plaintiff in a case having a fact situation similar to *Fitz-Gerald v. Hull* was affirmed on the ground of insufficient evidence to establish a constructive trust.

⁴⁹ *Beatty v. Guggenheim Exploration Co.*, 225 N. Y. 380, 122 N. E. 378, 381 (1919).