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Constructive Trusts in West Virginia

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EDITORIAL NOTE

CONSTRUCTIVE TRUSTS IN WEST VIRGINIA

A constructive trust, as has often been pointed out, is not a true trust at all, but is purely a remedial device¹ used by equity to prevent unjust enrichment. Hence, instead of dealing with constructive trusts as part of the law of trusts, the American Law Institute has included the subject in its Restatement of the Law of Restitution. According to the Restatement,

“Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises.”²

Or to put it another way, paraphrasing Judge Hatcher’s language in *State v. Phoenix Mutual Life Insurance Company*,³ in order to give effect to the maxim that “no man shall be permitted to profit

¹ Pound, *The Progress of the Law—Equity* (1920) 33 HARV. L. REV. 420, 420-421.

² RESTATEMENT, RESTITUTION (1937) § 160.

³ 114 W. Va. 109, 113, 170 S. E. 909 (1933).

by his own wrong", equity requires one who wrongfully obtains title to, or an interest in, property to hold it as constructive trustee for the one beneficially entitled. Aside from the fact that in a constructive trust, as in an express trust, one person holds property subject to the equitable interest of another, there is little similarity between the two. Unlike an express trust, a constructive trust is not a fiduciary relation and in no way depends upon the intention of the parties.⁴

Care should also be taken to distinguish a constructive trust from a resulting trust. Since both arise by implication or operation of law, there is a tendency to confuse them. It should be remembered, however, that a resulting trust is based upon presumed intention to create a trust, and if such intention is inferred, the trustee, "like the trustee of an express trust, is in a fiduciary relation to the beneficiary of the trust."⁵ On the other hand, as has already been pointed out, a constructive trust is not a fiduciary relation, and has nothing to do with the intention of the parties, but is imposed without regard and often contrary to their intention in order to prevent unjust enrichment. Although our court has not always kept the difference between a resulting and a constructive trust in mind,⁶ that it does recognize the difference is clear. Commenting on two possible theories of the plaintiff's bill in *Patrick v. Stark*, the court said:

"... In the former case, he would set up a resultant trust, an equitable title in the land, which a court of equity would sustain, on the presumption that it was the intention of the parties, to make the one holding the legal title a trustee for the other. In the latter case, the bill would allege what is known in equity as a constructive trust, resting upon a fraud which made the perpetrator thereof a trustee for the injured party."⁷

In view of the fact that a constructive trust is simply a remedial device employed by equity to prevent the unjust enrichment of a wrongdoer who has acquired property under circum-

⁴ RESTATEMENT, RESTITUTION § 160, Comment a, which see for further discussion of the difference between the two. See also *Keller v. Washington*, 83 W. Va. 659, 665-666, 98 S. E. 880 (1919). Note that in this case our court seems to have used the terms constructive trust and resulting trust as synonymous. That these two should also be kept separate, see discussion, *infra*.

⁵ RESTATEMENT, RESTITUTION § 160, Comment b.

⁶ See n. 4, *supra*.

⁷ 62 W. Va. 602, 605-606, 59 S. E. 606 (1907). And *of. Johnson's Exr's v. Johnson*, 83 W. Va. 593, 98 S. E. 812 (1919).

stances rendering it inequitable for him to retain the property, it is obviously impossible to catalog all the situations in which a constructive trust will be raised. The specific instances, according to Pomeroy, are "as numberless as the modes by which property may be obtained, through bad faith and unconscientious acts."⁸ This being true, no effort will be made in this note to cover even all of the situations in which our court has granted relief by way of constructive trusts. Attention will be called to some of the more typical examples, however, to show the extent to which the principle has been developed in our cases, and also to show some of the instances in which our law, because of statutory provisions, differs from the general law of other states.

The fact that a constructive trust is only a remedial device of equity, carries with it a limitation on its use. If the injured party has an adequate remedy at law, equity may refuse relief by way of constructive trust, because such relief is not necessary to prevent unjust enrichment. This is well illustrated by a West Virginia case⁹ in which the plaintiff sought to charge the defendant as trustee of the proceeds of timber cut on plaintiff's land. In refusing because of the adequacy of the legal remedy to enforce a constructive trust, the court very properly intimated that, had the plaintiff been able to prove the defendant's alleged insolvency, the result would have been otherwise, because then a judgment at law for the trespass would have been an inadequate remedy.¹⁰

Another illustration of equity's refusal to enforce a constructive trust because of adequacy of the remedy at law is found in the case where title to ordinary chattels is obtained by fraud. Probably the most typical constructive trust is that based on fraud. According to the Restatement,

"Where the owner of property transfers it, being induced by fraud, duress or undue influence of the transferee, the transferee holds the property upon a constructive trust for the transferor."¹¹

⁸ POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 1045.

⁹ *W. M. Ritter Lumber Co. v. Lowe*, 75 W. Va. 714, 84 S. E. 566, L.R.A. 1916E 718 (1915).

¹⁰ For other illustrations of a refusal to raise a constructive trust because of the adequacy of the legal remedy, see RESTATMENT, RESTITUTION § 160, Comments *e* and *f*.

¹¹ *Id.* at § 166.

If the property involved is land, relief in equity by way of cancellation of the deed or reconveyance of title is clear.¹² However, if the property transferred is money or an ordinary chattel so that a judgment at law would be an adequate remedy, equity will refuse relief by way of constructive trust.¹³

The largest group of West Virginia cases involving constructive trusts illustrates the general principle that

“Where a person in a fiduciary relation to another acquires property, and the acquisition or retention of the property is in violation of his duty as fiduciary, he holds it upon a constructive trust for the other.”¹⁴

The case of *Feamster v. Feamster*¹⁵ is an excellent application of this principle. *B* was trustee for *C* of a judgment for more than \$5,000, which was a junior lien on land of the judgment debtor. *B* purchased the land at the judicial sale for a sum only a few dollars in excess of the total prior liens. Immediately thereafter *B* sold about one-third of the land for nearly \$1,000 more than he had paid for the whole tract. It was held that *B* as constructive trustee would have to account to *C* both for the profit realized and for the land still retained. As clearly shown in the court's opinion, the constructive trust raised in this type of case is, in the language of Cardozo, “the remedial device through which preference of self is made subordinate to loyalty to others.”¹⁶ This principle has been applied by our court to disloyal fiduciaries of all kinds—public officials,¹⁷ agents,¹⁸ attorneys,¹⁹ executors,²⁰ partners and joint adventurers.²¹

¹² See, for example, *Burrows v. Fitch*, 62 W. Va. 116, 57 S. E. 283 (1907). That the same is true where the transfer is based on mistake, see *RESTATEMENT, RESTITUTION* §§ 163-165.

For other cases where relief in equity was based on fraud, see *Bennett v. Harper*, 36 W. Va. 546, 15 S. E. 143 (1892); *Dickel v. Smith*, 38 W. Va. 635, 13 S. E. 721 (1893) (so-called “constructive fraud”); *Board of Trustees of the Lewis Prichard Charity Fund v. Mankin Investment Co.*, 118 W. Va. 134, 139 S. E. 96 (1936); same case on second appeal, 193 S. E. 805 (W. Va. 1937).

¹³ *RESTATEMENT, RESTITUTION* § 166, Comment *b*. But note that if the remedy at law is inadequate, as where the chattels are unique or the wrongdoer is insolvent, relief may be had in equity.

¹⁴ *Id.* at § 190. For specific applications and detailed discussion of this general principle, see c. 12 of the *RESTATEMENT*.

¹⁵ 35 W. Va. 1, 13 S. E. 53 (1891).

¹⁶ *Meinhard v. Salmon*, 249 N. Y. 458, 467, 164 N. E. 545 (1928).

¹⁷ *County Court of Raleigh County v. Cottle*, 81 W. Va. 469, 94 S. E. 948 (1918).

¹⁸ *Morris v. Joseph*, 1 W. Va. 256, 91 Am. Dec. 386 (1866); *Franks v. Morris*, 9 W. Va. 664 (1876); *Blake v. O'Neal*, 63 W. Va. 483, 61 S. E. 410 (1908); *Spriggs v. McCreery*, 87 W. Va. 204, 104 S. E. 479 (1920).

¹⁹ *Jackson v. Strader*, 61 W. Va. 161, 56 S. E. 177 (1907).

Because of the fact that so many of the cases involve breach of a fiduciary relation, it should not be assumed that such a relation is necessary to the creation of a constructive trust. Equity often bases a constructive trust on a wrong other than breach of duty by a fiduciary. Thus, in *Carleton Mining & Power Company v. West Virginia Northern Railroad Company*,²² where the defendant had wrongfully obtained control of plaintiff's property and had used it for his own benefit, it was held that the defendant as constructive trustee must account to the plaintiff for the property and for the profits derived from its use.

A classic example of the use of the constructive trust device to prevent a wrongdoer from profiting by his wrong is found in the cases dealing with acquisition of property by homicide. This problem is of comparatively small importance in this state because of our statute which provides that one convicted of feloniously killing another shall acquire from his victim no interest in any property by descent, by will, as beneficiary of an insurance policy, or otherwise.²³ Since our court in a recent case, however, has held that although this statute makes conviction of a felonious killing conclusive against the slayer, it leaves the case of a non-felonious killing to be decided as it would have been in the absence of any statute,²⁴ it becomes important to determine what our law was prior to the enactment of the statute.

Courts have generally dealt with the problem of a murderer's right to recover as beneficiary of an insurance policy on the life of his victim as distinct from the problem of a murderer's right to inherit, take by devise, or otherwise acquire property from his victim. Though differing in the theory by which the result is reached, the decisions, including several from West Virginia,²⁵

²⁰ *Ash v. Wells*, 76 W. Va. 711, 86 S. E. 750 (1915).

²¹ *Battin v. Woods*, 27 W. Va. 58 (1885); *Berry v. Colborn*, 65 W. Va. 493, 64 S. E. 636 (1909); *Bond v. Taylor*, 68 W. Va. 317, 69 S. E. 1000 (1911); *Floyd v. Duffy*, 68 W. Va. 339, 69 S. E. 993, 33 L. R. A. (N. S.) 883 (1911); *Kersey v. Kersey*, 76 W. Va. 70, 85 S. E. 22 (1915); *Lopinsky v. Hurvitz*, 87 W. Va. 422, 105 S. E. 593 (1921); *Mullens v. Wolfe*, 200 S. E. 37 (W. Va. 1938).

²² 113 W. Va. 20, 166 S. E. 536 (1932). For a more detailed statement of the facts, see same case on a former appeal, 110 W. Va. 631, 631-633, 159 S. E. 44 (1931). See also *Campbell v. O'Neill*, 69 W. Va. 459, 471, 72 S. E. 732 (1911) (unauthorized dealings with plaintiff's property by one who assumed to act as guardian).

²³ W. VA. REV. CODE (1931) c. 42, art. 4, § 2.

²⁴ *Metropolitan Life Ins. Co. v. Hill*, 115 W. Va. 515, 177 S. E. 188 (1934).

²⁵ *Johnston v. Metropolitan Life Ins. Co.*, 85 W. Va. 70, 100 S. E. 865 (1919); *Wickline v. Phoenix Mutual Life Ins. Co.*, 106 W. Va. 424, 145 S. E.

are in substantial agreement "that a beneficiary cannot maintain an action for insurance proceeds after having murdered the insured."²⁶ In other than the insurance cases, there are in the absence of statute three lines of authority, which are well summarized in *Bryant v. Bryant*:

"... (1) The legal title does not pass to the murderer as heir or devisee; (2) the legal title passes to the murderer and may be retained by him in spite of his crime; (3) the legal title passes to the murderer, but equity will treat him as a constructive trustee of the title because of the unconscionable mode of its acquisition, and compel him to convey it to the heirs of the deceased, exclusive of the murderer."²⁷

Note that the insurance cases, holding that the slayer gets nothing, are like the cases adopting the first of these theories. They have nothing at all to do with the constructive trust theory which is applicable only if the slayer acquires property of which he may be required by equity to account as trustee.

The only West Virginia cases involving this broad problem have been insurance cases holding that the slayer may not recover and hence are not applications of the constructive trust theory. Although this would seem to be clear, in one of these cases the court, after quoting from *Bryant v. Bryant*, stated that in *Johnston v. Metropolitan Life Insurance Company*,²⁸ it had adopted the constructive trust theory.²⁹ An examination of the facts and holding in the *Johnston* case makes this doubtful. In that case, the insured was murdered by his wife who was the beneficiary of an insurance policy on his life and also the sole distributee of his estate. It was held that under these circumstances the insurance company was not liable to anyone. The court said that on grounds of "public policy" the wife could not recover. Further, although normally recovery by the administrator of the insured would be allowed

743 (1928). Although the theory on which our court denies recovery in such a case is not entirely clear, it would seem to be that murder of the insured by the beneficiary is a risk impliedly excepted on grounds of public policy from the risks assumed by the insurer. See *State v. Phoenix Mutual Life Ins. Co.*, 114 W. Va. 109, 111-112, 170 S. E. 909 (1933).

²⁶ Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution* (1936) 49 HARV. L. REV. 715, 717, n. 8.

²⁷ 193 N. C. 372, 374, 137 S. E. 188 (1927). For further discussion of these three views, see BOGERT, TRUSTS AND TRUSTEES (1935) § 478; Wade, *supra* n. 21, at 717 *et seq.*; Comment (1936) 42 W. VA. L. Q. 241.

²⁸ 85 W. Va. 70, 100 S. E. 865 (1919). This was the first West Virginia case on the problem.

²⁹ *State v. Phoenix Mutual Life Ins. Co.*, 114 W. Va. 109, 113-114, 170 S. E. 909 (1933).

for the benefit of the estate, such recovery was denied in this case because the wife was the sole distributee. This being so, it seems clear that the court did not hold that there was a constructive trust. If so, who was the constructive trustee? What was the trust *res*? Who was the beneficiary?

The only mention of a trust is found in the statement that where the beneficiary is denied recovery, "a trust results in favor of the estate of the insured."³⁰ An explanation more satisfactory than the resulting trust theory would seem to be that given by the court in the preceding sentence where it said that the proceeds of the policy would become part of the estate of the insured in just the same way that a lapsed bequest or devise would fall into the residuary estate.

All of this seems to lead to but one conclusion—that our court has not as yet applied the constructive trust doctrine to a case of this sort. The most likely opportunity which may arise for such an application in the future would come about through a combination of the holding that our statute does not cover the case of a non-felonious killing and the proposition stated in syllabus 4 of the *Johnston* case that "the estate of one who is murdered will pass by devolution to the person designated by law to take the same, notwithstanding such person may have been guilty of murder in taking the life of the one from whom he inherits."³¹ Thus, if a wife should kill her husband under circumstances making her guilty only of involuntary manslaughter and as a result should take title to his property as heir, the question would then arise whether she should be allowed to take beneficially under the second view stated in *Bryant v. Bryant* or whether, in order to prevent her from profiting by her crime, she should be required to hold the property as constructive trustee for the person or persons who would have taken had she predeceased her husband. It might be noted that if the court should hold her accountable as constructive trustee, it would reach a result contrary to that of the Restatement which says that its rules "are not applicable where the slayer was guilty only of manslaughter."³² It should be stated, however, that our court was correct in refusing recovery on an insurance policy to the beneficiary who was guilty only of involuntary manslaughter, because the test generally applied in the insurance cases is whether

³⁰ *Johnston v. Metropolitan Life Ins. Co.*, 85 W. Va. 70, 73, 100 S. E. 865 (1919).

³¹ *Id.* at 70.

³² RESTATEMENT, RESTITUTION § 187, Comment *e*.

or not the death of the insured was intentionally caused by the beneficiary.'³³

Another possible and not unlikely way for the problem to arise is found in the case where, though the killing was felonious, there has been no conviction. Our statute covers only cases in which there has been conviction of a felonious killing. If the killing was felonious, but there has been no conviction, our court would probably hold that the case should be decided on general principles, just as it did when there was conviction of a non-felonious killing. Then under the rule stated in the *Johnston* case, the murderer would get title to the property and the question would be whether he took beneficially or as constructive trustee. According to the Restatement he would take as constructive trustee even though there has been no conviction,³⁴ and in view of our court's statement that it has already adopted the constructive trust theory, there seems little doubt that it would reach the same result.

One other situation, which raises interesting questions and has caused considerable confusion in the field of constructive trusts but which is also of comparatively small importance in this state, is the acquisition of an interest in land under an oral agreement to hold in trust, which agreement is unenforceable because of the Statute of Frauds.³⁵ By statute adopted in 1931 oral trusts in land, whether for the grantor or for a third party, are enforceable as valid express trusts.³⁶ Since, however, our court has held that this statute is not retroactive,³⁷ the problem whether the grantee who repudiates the trust holds as constructive trustee may still be raised in connection with transfers made prior to the enactment of the statute. Even before the statute a conveyance upon oral trust for a third person was enforceable.³⁸ If the oral trust was for the grantor, it was unenforceable and the grantee could not be held as constructive trustee in the absence of fraud or breach of confidential relationship.³⁹

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³³ COOLEY, INSURANCE (2d ed. 1928) 5227.

³⁴ RESTATEMENT, RESTITUTION § 187, Comment *f*.

³⁵ See *id.* §§ 182-183, for a discussion of the problem in general.

³⁶ W. VA. REV. CODE (1931) c. 36, art. 1, § 4, applied in *Winfree v. Dearth*, 118 W. Va. 71, 188 S. E. 880 (1936).

³⁷ *Hall v. Burns*, 113 W. Va. 820, 169 S. E. 522 (1933).

³⁸ *Madden, Trust and the Statute of Frauds* (1925) 31 W. VA. L. Q. 166.

³⁹ *Hall v. Burns*, 113 W. Va. 820, 169 S. E. 522 (1933). This is substantially the rule adopted by the RESTATEMENT, RESTITUTION § 182. See also Note (1931) 37 W. VA. L. Q. 434.