Kentucky Law Journal

Volume 42 | Issue 3 Article 6

1954

Current Developments in Resulting Trusts and Constructive Trusts in Kentucky

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Current Developments in Resulting Trusts and Constructive Trusts in Kentucky

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I. CLASSIFICATION OF RESULTING TRUSTS AND CONSTRUCTIVE TRUSTS AND THEIR DEFINITION.

Viewing the force which brings a trust into existence, all trusts may be classified into trusts by intention and trusts by operation of law.[1] There seems to be apparent agreement in the point of view that an express trust and an implied trust are brought about by the intention of the parties, and it is also apparent that a constructive trust is one created, not by intention, but by operation of law.[2]

With the express and implied trusts on one hand, and the constructive trust on the other hand, we must find a place for the resulting trust. Some authorities say that a resulting trust is an implied-in-fact trust,[3] and others say that it is an implied-in-law trust.[4]

The better view seems to be that a resulting trust is not greatly different from an express trust, and that a resulting trust is one of the trusts which enforces the intentions of the parties.[5] In an express trust the intent is clear. In the implied trust the intent for a trust, though not clear, is shown from surrounding facts and circumstances to have been present.[6] The latter description also fits a resulting trust, because the courts do not enforce a resulting trust unless there is an indication of intention that the

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[1] 54 AM. JUR., *Trusts* 22; Costigan, *The Classification of Trusts*, 27 HARV. L. REV. 437 (1914).

[2] Dotson v. Dotson, 307 Ky. 106, 209 S.W. 2d 852 (1948); Long v. Reiss, 290 Ky. 198, 160 S.W. 2d 668 (1942); Noland v. Howard, 221 Ky. 33, 297 S.W. 942 (1927); Costigan, *supra* n. 1, at 448; 54 AM. JUR., *Trusts* 167.

[3] Costigan, *supra* n. 1, at 439; Nickels v. Clay, 14 Ky. L. Rep. 925 (1893).

[4] Wright v. Yates, 140 Ky. 283, 130 S.W. 1111 (1910); 54 AM. JUR., *Trusts* 147, 152.

[5] Wright v. Yates, *supra* n. 4; 54 AM. JUR., *Trusts* 152-154.

[6] Costigan, *supra* n. 1, at 437-439; 54 AM. JUR., *Trusts* 62-64.

legal titleholder should not also have the beneficial interest.[7] This survey shows us that a resulting trust is one of the intent-enforcing trusts, though the least manifest, and that it is not merely raised by law. Some may say that a resulting trust is only a creature of judicial efforts to prevent a wrongdoer from unjustly enriching himself by his own wrongdoing, but in rebuttal to that argument we point out that it is a historical fact that such was the only reason why courts of equity ever took jurisdiction of any trusts at all.[8]

The constructive trust is the only trust that is not an intent-enforcing trust, but rather is a trust by operation of law.[9] The constructive trust rectifies fraud, whether actual fraud or only constructive fraud.[10] As one Kentucky court so appropriately said, the constructive trust is "constructed" by equity to remedy a wrong.[11] One legal writer says that the constructive trust is not implied, but rather is imposed as a *fiat* trust.[12]

II. RESULTING TRUSTS.

A. Essentials, Purpose & Nature

A resulting trust is an implied-in-fact trust, created by law, but with a purpose to enforce the intention of the parties.[13] If the intent is clear, there is an express trust, and if there is ambiguous intent, such ambiguity may be construed to be an intent for an implied trust. Where there is no intent expressed in words however, neither clear nor ambiguous, but the facts and

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[7] Wright v. Yates, *supra* n. 4; Annotation, *Wills-Devolution-Failure of Trust, IV. Instances of Absolute Gifts*, 96 A. L. R. 959, 969 (1935); Howard v. Howard, 133 Ky. 568, 118 S.W. 367 (1909); Brothers v. Porter, 45 Ky. (6 B. Mon.) 106 (1845); Evans, *Resulting and Constructive Trusts in Kentucky*, 20 KY. L. J. 383, 383-394 (1932).

[8] Costigan, *supra* n. 1, at 452, citing Ames, *Lectures On Legal History*, 21 HARV. L. REV. 225, 237-238 (1907).

[9] Noland v. Howard, 221 Ky. 33, 297 S.W. 942 (1927); Traughber v. King, 235 Ky. 658, 32 S.W. 2d 8 (1930); Long v. Reiss, 290 Ky. 198, 160 S.W. 2d 668 (1942); Dotson v. Dotson, 307 Ky. 106, 209 S.W. 2d 852 (1948); 54 AM. JUR., *Trusts* 167-169.

[10] Dotson v. Dotson, *supra* n. 9 (raised to circumvent fraud); Moore v. Terry, 293 Ky. 727, 170 S.W. 2d 29 (1943) (looks to see if result of transaction is "unconscionable"); May v. May, 161 Ky. 114, 170 S.W. 537 (1914) (speaks of "fraud or inequitable conduct"); Wright v. Yates, *supra* n. 4 (refers to fraud and breach of moral or legal duty); 54 AM. JUR., *Trusts* 167-169; Costigan, *supra* n. 1 at 451.

[11] Bates v. Bates, 182 Ky. 566, 206 S.W. 800 (1918).

[12] Costigan, *supra* n. 1, at 439.

[13] Wright v. Yates, *supra* n. 4.

circumstances surrounding ownership or acquisition of title show an intent for a trust, the courts will declare a resulting trust from a given set of facts and circumstances in order to enforce the intention of the parties.[14] In the cases where intent for a trust is clear, or is found in ambiguous words, the courts rely upon direct proof, but where the intent is not expressed in words, the courts rely upon indirect or circumstantial proof.

B. K. R. S. 381.170 Applied

It was circumstantial proof that created the most prominent common law resulting trust, that being the case where A bought land from B and the title was taken in the name of C, a stranger.[15] The circumstances showed that C was not entitled to the beneficial interest, or use as it was called, because there was no showing from those facts that there was any intention by A, the one furnishing the consideration, to give C anything but bare legal title. In those early days it was common for a landowner to hold for the use or benefit of another. It is now the general practice for the owner of land to hold it for his own use and benefit. The Kentucky Legislature has enacted a statute changing the old rule. K. R. S. 381.170[16] says:[17]

> CONSIDERATION PAID BY OTHER THAN GRANTEE: EFFECT. When a deed is made to one person, and the consideration is paid by another no use or trust results in favor of the latter unless the grantee takes a deed in his own name without the consent of the person paying the consideration, or unless the grantee in violation of a trust purchases the lands deeded with the effects of another person. Such deeds are fraudulent as against the existing debts and liabilities of the person paying the consideration.

It is evident that the very words of the statute abolish the old doctrine of resulting trusts in the case of purchase money resulting trusts just discussed. There is expressly excepted from the provisions of the statute those cases where a breach of duty or trust occurs, which will be dealt with under constructive trusts, *infra,*

[14] Nickels v. Clay, 14 Ky. L. Rep. 925 (1893).

[15] Similar cases were dealt with in a similar manner. They are not of great value in a survey of Kentucky law. For an elucidation of English resulting trusts, however, see Costigan, *supra* n. 1 at 439 *et seq.*

[16] Kentucky Revised Statutes, 1953 Edition.

[17] Kentucky Acts of 1893, Ch. 150 Sec. 17, p. 495.

and where the purchaser did not consent to the title being taken in the name of the third party. Such lack of consent is a matter to be proven by he who seeks to establish the trust.[18] It does not matter that the third party who receives title is a stranger or a person close to the party paying the purchase price.[19]

C. Current Status of Cases in Kentucky

In view of K. R. S. 381.170, when A buys land from B and the title is taken in the name of C, a stranger, the presumption from such facts, contrary to the common law, is that A meant and intended to vest in C both legal title and the equitable title, sometimes called the use or beneficial interest.

The statute does not affect the case of A buying B's land and then B repurchasing it from A to satisfy his vendor's lien. In *Howard* v. *Howard*[20] the Kentucky Court of Appeals said that where the original vendee, A, continues in possession of the land after B foreclosed his vendor's lien, and after A's death his widow and children held possession of it, all with B's knowledge and without complaint from B, the presumption is a resulting trust for A and his heirs. Thus we see that the common law idea of reading into circumstances the apparent existence of a trust is not changed any further than the statute expressly demands.[21]

The English Statute of Frauds, which required all trusts in land to be in writing, did not apply to resulting trusts, so as to prevent an unjust benefit to the legal titleholder. Kentucky reaches the same result, and correctly so, by saying that where A buys from B and has B put title in C, there being a parol agreement by C to hold in trust for A, K. R. S. 381.170 does not control because that statute applies only to the case where there is no parol agreement.[22] Thus the statute is reduced to one of presumption only, setting up a presumption of law to be drawn from the bare facts set out in the statute.[23] If the party seeking to establish

[18] Masters v. Masters, 222 Ky. 427, 300 S.W. 894 (1927); Sewell v. Sewell, 260 S.W. 2d 643 (Ky. 1953).

[19] Clay v. Clay's Gdn., 24 Ky. L. Rep. 2016, 72 S.W. 810 (1903); Traughber v. King, 235 Ky. 658, 32 S.W. 2d 8 (1930); Sewell v. Sewell, 260 S.W. 2d 643 (Ky. 1953).

[20] 133 Ky. 568, 118 S.W. 367 (1909).

[21] Also see cases cited *supra* n. 19.

[22] Smith v. Smith, 121 S.W. 1002 (Ky. 1909).

[23] Sewell v. Sewell, 260 S.W. 2d 643 (Ky. 1953); Gibson v. Gibson, 249 S.W. 2d 53 (Ky. 1952).

a trust can show a parol agreement by the grantee to hold for the use or benefit of another who furnished the consideration, the court will enforce that parol agreement because K. R. S. 381.170 does not mention oral agreements.[24] The rule seems correct, because the statute is enacted in view of the mode of holding title for oneself, and because the English Statute of Frauds as to uses was not adopted in Kentucky.[25]

In *Ewing* v. *Clore*[26] the Kentucky Court of Appeals said that if the plaintiff did not actually furnish the consideration for the sale, it would not avail him to show a contract by which he promised to furnish it, because the plaintiff did not bring himself within the statute which at that time said:[27]

> When a deed shall be made to one person, and the consideration shall be paid by another, no use or trust shall result. . . . (Emphasis supplied).

Since the present statute, now K. R. S. 381.170, does not use words as indicative of a promise as the italicized words in the above-mentioned statute do, and since the court construed the above-mentioned statute to not allow a promise to be the consideration or payment, it is certain that a promise to pay is not sufficient consideration to make the statute operative today.

Didn't the court go by a roundabout route in reaching the decision in *Ewing* v. *Clore?* It appears that the same result could, and should, have been reached without trying to fit the case into the statute, because it is evident that the statute is not the real reason for the decision, but rather that the statute doesn't even apply since a prerequisite to its application is the very case which the court said did not exist here. If the case had come within the statute the result would have been the same as reached by the court, but putting the statute aside, we see at once that the ancient fact situation calling for a resulting trust did not exist. There being no purchase price given, there can be no unjust enrichment contrary to the intention of the parties, and there was not sufficient evidence to establish any trust intent, there being shown merely an oral promise to convey. It would have been better had the

[24] Patrick v. Prather, 144 Ky. 771, 139 S.W. 938 (1911).
[25] Vizard Inv. Co. v. York, 167 Ky. 634, 181 S.W. 370, 372 (1916).
[26] 219 Ky. 329, 292 S.W. 824 (1927).
[27] K. S. Sec. 2353 as set out in Ewing v. Clore, n. 26 *supra*, at 825.

court done as it did in *Howard* v. *Howard*,[28] and just flatly said that the common law rule was not changed in a case such as this, and that the common law rule did not create a trust in this case. More will be said about *Ewing* v. *Clore* from the point of view of constructive trusts, *infra*.

Several people may verbally join together and take a joint deed, apparently for them to share and share alike, and then by parol evidence show that the parol agreement was other than to share alike. In such a case a trust in land results for each to the extent of the amount paid by each.[29] Similarly, in the case of a partnership parol evidence may be used to establish the partnership and its terms in order to create a resulting trust as against the partner who holds title to the property in the partnership assets.[30] There is an apparent requirement, however, that the agreement be made before the purchase is made, because an agreement made between A and B after A purchased the property is in reality a contract to convey real estate already owned.[31]

The doctrine of resulting trusts, although more commonly applied to real estate, is not limited to real estate cases and is applied to personal property cases as well.[32] The Kentucky statute discussed does not, however, limit resulting trusts in personal property.[33]

An earlier contributor to the *Kentucky Law Journal*, the late Dean Alvin E. Evans, has well treated the matter of the failure of an express trust and a resulting trust arising from the ruins of the failed express trust.[34] The Kentucky Court of Appeals has considered intention as controlling in this matter also, as shown by a leading case involving a Shaker community.[35] The case is discussed in Dean Evans' article. Members contributed their property to the Shaker society for the perpetual use of the society, for the benefit of the members, and with the express agreement that

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[28] *Supra* n. 20.

[29] Brothers v. Porter, 45 Ky. (6 B. Mon.) 106 (1845).

[30] Holliday v. Holliday, 238 Ky. 522, 38 S.W. 2d 436 (1931).

[31] Wallace v. Marshall, 48 Ky. (9 B. Mon.) 148 (1848).

[32] Turner v. Risner, 280 Ky. 822, 134 S.W. 2d 951 (1939); White v. White, 229 Ky. 666, 17 S.W. 2d 733 (1929).

[33] See the express words of the statute and the Chapter classification in K. R. S. where the statute is compiled.

[34] Evans, *Resulting and Constructive Trusts in Kentucky*, 20 Ky. L. J. 383, 384 (1932).

[35] Easum v. Bohon, 180 Ky. 451, 202 S.W. 901 (1918). *See* discussion by Evans, n. 34, *supra*.

there should never be a return of the property. Although dissolution was never contemplated, there came a time when the society was disbanded and the heirs of a deceased member sought to recover for themselves their decedent's contribution. The court held that no resulting trust would be enforced for the heirs' benefit, because there was none intended. There is some disagreement with the result,[36] but it is in accord with the basic theory of the resulting trust, *i.e.* a resulting trust is enforced only because the parties intended that the legal titleholder should not also have the beneficial interest. In the case at hand it was expressly stipulated that the property was for the use of the society, which was necessarily made up of members, and that the property should never be returned to the contributor, thus cutting off any opportunity for the court to find a trust intent.

The Shaker case illustrates another general rule, it being that where a third person, C, has paid the consideration for the transfer of the property by A to B in trust, and the trust or purpose fails, there is a resulting trust in favor of C, the third person.[37] In the instant case the consideration for the transfer was evidently membership in the society and like conveyances by others, they being third persons.

The case just discussed further comes within the principle that when a conveyance in trust is for a valuable consideration, there is no resulting trust in favor of the grantor or his heirs when the express trust fails, because in view of the passing of consideration, there is no justification for presuming an intention for reverter to have been in mind when such intent is not expressly set out.[38] When the express trust that fails is founded on a donation or will, however, a resulting trust will arise for the benefit of the donor or his heirs, because there being no consideration for the conveyance, the law presumes such an understanding or intention as per the doctrine of equitable consideration.[39]

We might well note here that although a resulting trust may in fact be established by the evidence, the trust is ineffectual as against a *bona fide* purchaser without notice.[40]

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[36] Evans, n. 34 *supra*, at 385.
[37] 54 AM. JUR., *Trusts* 154, citing Easum v. Bohon, *supra* n. 35.
[38] Ibid.
[39] 54 AM. JUR., *Trusts* 154-155.
[40] Keaton v. Keaton, 294 Ky. 240, 171 S.W. 2d 260 (1943).

D. Evidence and Degree of Proof

The rule seems well settled, and has been often repeated and recently reaffirmed by the Kentucky Court of Appeals, that a mere preponderance of the evidence is not sufficient to establish a resulting trust, and that the facts of a resulting trust must be shown by a greater degree of proof. The Court of Appeals has consistently said and held that they will require "clear and convincing evidence" to establish a resulting trust.[41]

III. CONSTRUCTIVE TRUSTS.

A. Essentials, Purpose & Nature

The courts have not always had a clear understanding of the basic difference between a constructive trust and a resulting trust,[42] but there is a general agreement that a constructive trust differs from all other trusts, including resulting trusts, in that intention for a trust is not important in the court's decision to enforce a constructive trust.[43] Kentucky's Court of Appeals enforces a constructive trust in order to remedy a wrong of some nature[44] which may or may not amount to actual fraud.[45] Although fraud is one type of imposition from which the courts relieve a party by imposing a constructive trust,[46] the court will also impose a constructive trust if the conduct is merely inequitable[47] or unjust,[48] or even where the court feels that it would be unconscionable for the holder of the legal title to retain the property,[49] such as in a case of plain mistake.[50] The Court of Appeals has said that a constructive trust involves the breach of a moral or legal duty on the part of the one against whom the constructive trust is imposed.[51]

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[41] Sewell v. Sewell, 260 S.W. 2d 643 (Ky. 1953); Holliday v. Holliday, *supra* n. 30; Richardson v. Webb, 281 Ky. 201, 135 S.W. 2d 861 (1940); Bank of Clarkson v. Meredith, 301 Ky. 671, 192 S.W. 2d 967 (1946); Gayheart v. Cox, 305 Ky. 570, 205 S.W. 2d 153 (1947); Burgraf v. Reynolds, 306 Ky. 104, 206 S.W. 2d 206 (1947).

[42] *See* Hunt v. Picklesimer, 290 Ky. 573, 162 S.W. 2d 27, 31 (1942) wherein the court evidently confused the two.

[43] Authorities cited n. 9, *supra.*

[44] Bates v. Bates, supra n. 11; Traughber v. King, 235 Ky. 658, 32 S.W. 2d 8 (1930).

[45] May v. May, 161 Ky. 114, 170 S.W. 537 (1914).

[46] *See* Dotson v. Dotson, 307 Ky. 106, 209 S.W. 2d 852 (1948).

[47] *May* v. *May,* supra n. 45.

[48] Long v. Reiss, 290 Ky. 198, 160 S.W. 2d 668 (1942).

[49] Moore v. Terry, 293 Ky. 727, 170 S.W. 2d 29 (1943).

[50] Overton's Heirs v. Woolfolk, 36 Ky. (6 Dana.) 371 (1838).

[51] Wright v. Yates, 140 Ky. 283, 130 S.W. 1111 (1910).

Since the very nature of a constructive trust makes its imposition one of balancing the equities in a given case, a constructive trust is not enforceable against a stranger to the transaction from which the trust arises.[52]

B. Effect of K. R. S. 381.170

In an earlier part of this article the Kentucky statute which limits resulting trusts was discussed.[53] That statute expressly excepts from its operation those cases where a breach of duty or trust occurs, and such cases come within our definition of a constructive trust, *supra.* K. R. S. 381.170 does not affect our study of constructive trusts, because the statute applies only to purchase money resulting trusts. New York has a comparable statute that says, ". . . no use or trust results . . ." in certain cases, and Justice Benjamin Cardozo, then on the New York Court of Appeals, in a well studied opinion, said that since the statute in New York used the word "results", the statute applied only to *resulting* trusts and did not affect the law of constructive trusts.[54] Our Kentucky statute uses the same word. The New York decision abovementioned is sound, and Kentucky follows a similar rule, because the legislature certainly did not intend by its enactment to do away with the long standing fundamental function of equity courts, the remedy of unconscionable wrongs.[55]

C. Statute of Frauds

It is well settled that the Statute of Frauds does not affect the enforcement of a constructive trust because a constructive trust is not based upon transactions between parties which looked toward a trust, but rather upon the function of equity courts in remedying what, without the intervention of the court, would be an unconscionable wrong.[56]

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[52] Ibid.; Lowe v. Lowe, 312 Ky. 640, 229 S.W. 2d 442 (1950).
[53] Part II, B. K.R.S. 381.170 Applied.
[54] Foreman v. Foreman, 251 N. Y. 237, 167 N.E. 428 (1929).
[55] Graham v. King, 96 Ky. 339, 24 S.W. 430, 431 (1893) citing 2 POMEROY, EQUITY JURISPRUDENCE Secs. 1030-1044.
[56] Swaner v. Hash, 288 Ky. 485, 156 S.W. 2d 852 (1941); Clark v. Smith, 252 Ky. 50, 66 S.W. 2d 93 (1933); Rudd v. Gates, 191 Ky. 456, 230 S.W. 906 (1921); Willis v. Lam, 158 Ky. 777, 166 S.W. 251 (1914); Griffin v. Schlenk, 139 Ky. 523, 102 S.W. 837 (1907); Steifvater v. Steifvater, 246 Ky. 646, 53 S.W. 2d 926 (1932).

The Kentucky case of *Ewing* v. *Clore* was discussed in an earlier part of this article[57] and it may be well to now revive our discussion of the case, because of its relation to the Statute of Frauds. There plaintiff had orally promised defendant that he would furnish consideration for the purchase of realty by defendant, and plaintiff, never having paid the purchase price, sought to have a resulting trust declared. Because no consideration was paid, there was no unjust enrichment contrary to the intention of the parties against which the courts would relieve. Why didn't the court enforce the promises of defendant as a matter of constructive trust? The function of equity is not to circumvent the law, but to relieve where there is no adequate remedy at law for an injustice. In *Ewing* v. *Clore,* the case now under discussion, the only injustice was that defendant backed out of his oral promise and stood behind the shield which the law gave him, the statute which required his contract to be in writing before it could be enforced. Since the contract was executory on both sides, there was no inequitable breach of moral or legal duty by defendant, and the parties were left *in statu quo.*

The foregoing discussion is to illustrate that although the Statute of Frauds is no defense against a constructive trust imposed by the court, a constructive trust will not be imposed merely to put aside the Statute of Frauds when there is no showing that the results would be unconscionable without the intervention of equity.

An enlightening Kentucky case of recent years is *Moore* v. *Terry,*[58] wherein the court was faced with a problem of deciding whether a constructive trust existed in the light of facts which showed that H conveyed property to W, his wife, when H was facing a long prison term. Further facts were that W tried to convey the same property back to H on her death bed, but failed to comply with the formal requirements of the law, making the conveyance attempt void. H sought to enforce a constructive trust, claiming that W obtained the property from him on a promise to reconvey it to him when he got out of prison. The court said that this was not a case calling for a constructive trust, and made the following enlightening statements:

[57] Part II, C. Current Status of Cases in Kentucky. Citation at n. 26, supra.
[58] Citation at n. 49, *supra.*

> The husband conveyed the property to his wife for the protection of her and their children while he was confined in prison, but that fact did not constitute a constructive trust. It is not unusual for the head of the family to put the title of the home in his wife or to make a conveyance of it to her when ominous clouds appear on the horizon. And there is no rule of law or equity which says such actions create a constructive trust in his favor. If such were the law, the husband could revoke at pleasure his deed to the wife.
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> *In the instant case there was no misrepresentation, concealment, undue influence or any advantage taken by the wife or any circumstance making it unconscionable for her to retain title to the property.* (Emphasis supplied)

Although the foregoing case does not involve the Statute of Frauds, but instead the Statute of Deeds, the parallel illustration seems to serve our purpose well.

D. Current Status of Cases in Kentucky

We have already pointed out that equity will impose a constructive trust where there is a case of plain mistake, and thus where A made a deed to C instead of to B, who was the proper grantee, the court held that C held title subject to a constructive trust for A in order to prevent an unconscionable result.[59]

When a grantee makes an oral promise to convey or devise property to another as an inducement for a conveyance to him, the court enforces a constructive trust for that intended purpose upon failure of the grantee to do as promised.[60] One court said that such was "sufficient fraud" to support a constructive trust.[61]

It has been held in a fairly recent case that the failure of the party seeking to establish the trust to show that *promise* by the requisite degree of proof was sufficient cause for saying that no constructive trust existed at all.[62]

Usually the breach of a fiduciary duty, such as agency,[63] em-

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[59] Overton's Heirs v. Woolfolk, n. 50 *supra.*

[60] Steifvater v. Steifvater, 246 Ky. 646, 53 S.W. 2d 926 (1932); Farley v. Gibson, 235 Ky. 164, 30 S.W. 2d 876 (1930); Rudd v. Gates, 191 Ky. 456, 230 S.W. 906 (1921); Chapman's Ex'r v. Chapman, 152 Ky. 344, 153 S.W. 434 (1913); Becker v. Neurath, 149 Ky. 421, 149 S.W. 857 (1912).

[61] Becker v. Neurath, n. 60 *supra.*

[62] Moore v. Terry, n. 49 *supra.*

[63] Antle v. Haas, 251 S.W. 2d 290 (Ky. 1952).

ployment,[64] trust,[65] guardian[66] or personal representative[67] in the matter of property will make a wrongdoer a constructive trustee. Thus, when a real estate broker agreed to purchase real estate for a client and instead purchased it for himself, the court imposed a constructive trust upon the property for the benefit of the client.[68] Although a constructive trust will not be enforced against a stranger to the wrongdoing,[69] yet if there is a third party involved in the wrongdoing, the fact that he is not the fiduciary will not protect him, if he knew that what was done was contrary to the terms of the trust or contract of employment of the fiduciary.[70]

Closely akin to the foregoing are the cases of family confidential relationships and attorney-client confidences. Thus, where the Court of Appeals found that a father "overreached and mercilessly cheated" his children in the matter of some real estate, equity constructed a trust.[71] The mere fact that an attorney represents an estate and purchases assets of that estate creates a trust for the heirs.[72] In *Hunt* v. *Picklesimer*[73] the Court of Appeals said that the trust which arises between a lawyer and his client, when the lawyer wrongfully acquires his client's property is a *resulting* trust, but such a statement does not appear to be founded upon the essential theory of resulting trusts.[74]

Kentucky says that the mere wrong in assuming control, as distinguished from title, over the property of another is sufficient cause for a constructive trust.[75] As a corollary, when a fiduciary wrongfully sells or disposes of the property of another, the courts

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[64] Schwartz Amusement Co. v. Independent Order, Etc., 278 Ky. 563, 128 S.W. 2d 965 (1939).

[65] Taylor v. Harris' Adm'r, 164 Ky. 654, 176 S.W. 168 (1915).

[66] *Ibid.*

[67] Thompson v. Fraley, 279 Ky. 323, 130 S.W. 2d 793 (1939).

[68] Antle v. Haas, *supra* n. 63. There are earlier cases with contrary results. See Evans, *supra* n. 34 at 408-409.

[69] Cases cited at n. 52, *supra.*

[70] Antle v. Haas, *supra* n. 63; Taylor v. Harris' Adm'r, *supra* n. 65.

[71] Bates v. Bates, 182 Ky. 566, 206 S.W. 800 (1918).

[72] Walker v. Carter, 208 Ky. 197, 270 S.W. 770 (1925). The court did not elaborate as to what kind of trust—resulting, constructive, express or implied—was created, but the facts fit only the law of constructive trusts. In Dean Evans' article he discussed the case under the subject of constructive trusts. *See* Evans, n. 34 *supra* at 411.

[73] *Supra,* n. 42.

[74] *See* Part II, *supra.*

[75] Trevathan's Ex'r v. Dee's Ex'rs, 221 Ky. 396, 298 S.W. 975 (1927); Smith v. Cornett, 26 Ky. L. Rep. 265, 80 S.W. 1118 (1904).

impose a constructive trust upon the proceeds of the sale or disposition, in the hands of the fiduciary.[76]

A few early cases refused to impose a constructive trust in cases of criminal acts, but the weight of modern authority is that a constructive trust will be applied in the cases of a plain conversion of property or wrongful or fraudulent use of another's property.[77]

Similar to the case of a resulting trust, a constructive trust may well be established by the evidence but it is not available against a *bona fide* purchaser without notice.[78]

E. Presumptions and Proof

When a fact situation is shown that would create a constructive trust in accord with the foregoing, the person upon whom the trust is sought to be imposed must go forward with the evidence and show payment or disposition of the property as would release him from his liability as a constructive trustee.[79]

Although some of the Kentucky cases announce slightly different rules,[80] it is apparently the law that, as in the case of a resulting trust, the Kentucky Court of Appeals requires "clear and convincing evidence" such as leaves no reasonable doubt, to establish a constructive trust,[81] except that in fiduciary cases only "slight evidence" is required to establish the constructive trust because of the relationship of a fiduciary to his transactions.[82]

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[76] Farmers Bank of White Plains v. Bailey, 221 Ky. 55, 297 S.W. 938 (1927); 54 AM. JUR., *Trusts* 187-188.

[77] 54 AM. JUR., *Trusts* 187-188.

[78] 54 AM. JUR., *Trusts* 189-192; Cf. Keaton v. Keaton, 294 Ky. 240, 171 S.W. 2d 260 (1943) dealing similarly with resulting trusts.

[79] Taylor v. Harris' Adm'r, *supra* n. 65.

[80] Taylor v. Fox's Ex'rs, 162 Ky. 804, 73 S.W. 154 (1915) (held that facts were not established by that "certain and undoubted testimony" which the court required); May v. May, *supra* n. 45 (definite, clear and convincing); Deaton v. Bowling, 302 Ky. 829, 196 S.W. 2d 603 (1946) (definite, clear and convincing); Moore v. Terry, supra n. 49 (definite, clear and convincing); Curlee v. Hall, 296 Ky. 657, 178 S.W. 2d 193 (1944) (definite and satisfactory); Langford v. Sigmon, 296 Ky. 650, 167 S.W. 2d 820 (1943) (clear, strong and convincing); Clark v. Smith, 252 Ky. 50, 66 S.W. 2d 93 (1933) (clear, definite, and unequivocal).

[81] Panke v. Panke, 252 S.W. 2d 909 (Ky. 1952); Reed v. Reed, 273 Ky. 502, 117 S.W. 2d 211 (1938); Cape v. Leach, 283 Ky. 662, 142 S.W. 2d 971 (1940); Driskill v. Driskill's Adm'r, 307 Ky. 627, 211 S.W. 2d 840 (1948); Knight v. Rowland, 307 Ky. 18, 209 S.W. 2d 728 (1948).

[82] Whitsell v. Porter, 309 Ky. 247, 217 S.W. 2d 311 (1949).

KENTUCKY LAW JOURNAL

Vol. XLII March, 1954 Number 3

The *Kentucky Law Journal* is published in November, January, March and May by the College of Law, University of Kentucky, Lexington, Kentucky. It is entered as second-class matter October 12, 1927, at the post office, at Lexington, Kentucky, under the act of March 3, 1879.

Communications of either an editorial or a business nature should be addressed to *Kentucky Law Journal,* University of Kentucky, Lexington, Kentucky.

The purpose of the *Kentucky Law Journal* is to publish contributions of interest and value to the legal profession, but the views expressed in such contributions do not necessarily represent those of the *Journal.*

The *Journal* is a charter member of the Southern Law Review conference.

Subscription price: $4.00 per year $2.00 per number