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Parol Evidence to Prove Resulting Trusts.

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COMMENTS

PAROL EVIDENCE TO PROVE RESULTING TRUSTS

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Resulting trusts occupy an important position in conveyances of real property, and are applied to facilitate equitable transactions and to help accomplish the intent of the parties.[1] While an express trust is declared in express terms and arises from the stated intentions of the parties, a resulting trust arises out of the transaction by operation of law, based on the presumed intentions of the parties.[2] Although resulting trusts are implied by law, the circumstances which give rise to their creation must be proven.[3] Inherent in this burden of proof are problems relating to the admissibility of parol evidence to create a resulting trust.

Implied trusts can be divided into two major groups—resulting trusts and constructive trusts.[4] Evidence admissible to establish each type of trust may vary and an understanding of the distinctions of the two trusts is essential. A resulting trust may be imposed on any type of property,[6] but must arise at the time when legal title passes.[6] A constructive trust, on the other hand, is created when a party breaches a fiduciary relationship and is thereby unjustly enriched.[7] In addition, a resulting trust always carries with it the implied intention of the parties to create a trust, while a constructive trust arises

1. San Antonio Loan & Trust Co. v. Hamilton, 155 Tex. 52, 66, 283 S.W.2d 19, 27 (1955); Allen v. Rodriguez, 480 S.W.2d 270, 271 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.); Knox v. Long, 251 S.W.2d 911, 919 (Tex. Civ. App.—Texarkana 1952), *rev'd on other grounds*, 152 Tex. 291, 257 S.W.2d 289 (1953).

2. San Antonio Loan & Trust Co. v. Hamilton, 155 Tex. 52, 66, 283 S.W.2d 19, 27 (1955).

3. *See* Carson v. White, 456 S.W.2d 212, 215 (Tex. Civ. App.—San Antonio 1970, writ ref'd n.r.e.).

4. Omohundro v. Matthews, 161 Tex. 367, 373, 341 S.W.2d 401, 404 (1960); Hereford Land Co. v. Globe Indus., Inc., 387 S.W.2d 771, 775 (Tex. Civ. App.—Tyler 1965, writ ref'd n.r.e.).

5. Allen v. Rodriguez, 480 S.W.2d 270, 271 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.).

6. Atkins v. Carson, 467 S.W.2d 495, 501 (Tex. Civ. App.—San Antonio 1971, writ ref'd n.r.e.); Wilson v. Willbanks, 417 S.W.2d 925, 927-28 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.).

7. *See* Thigpen v. Locke, 363 S.W.2d 247, 253 (Tex. 1962); Oak Cliff Bank & Trust Co. v. Steenbergen, 497 S.W.2d 489, 492 (Tex. Civ. App.—Waco 1973, writ ref'd n.r.e.); Commercial Standard Ins. Co. v. Marin, 488 S.W.2d 861, 871 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.); Miller v. Huebner, 474 S.W.2d 587, 591 (Tex. Civ. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.).

by operation of law regardless of intent and is based on fraud and unjust enrichment.[8] A resulting trust is based on the equitable doctrine of consideration, and usually arises when one party pays valuable consideration for the property, but title vests in another.[9]

The parol evidence rule, when applicable, can operate to exclude evidence which would, if admitted, establish a resulting trust.[10] In the absence of evidence related to fraud, accident or mistake the parol evidence rule will exclude evidence of prior negotiations or agreements of the parties to the written contract if this evidence contradicts the terms of the written agreement.[11] Although Texas has adopted a statute requiring all trusts to be in writing,[12] the statute is applicable only to express trusts and does not affect resulting trusts.[13] The statute is important, however, when in attempting to create a resulting trust, an express oral trust is created. The statute renders the express oral trust invalid and any estate sought to be established by the trust fails.[14]

PRESUMPTIONS IN CONVEYANCING

There are certain presumptions which may arise in a conveyance of real property which can affect the burden of proof and, as a result, determine what evidence will be admitted to prove the conveyance. The grantee in the deed is generally presumed to own both equitable and legal title to the property.[15] A further presumption provides that where one party pays valuable consideration for property and title vests in another, a resulting trust is

8. Sohio Petroleum Co. v. Jurek, 248 S.W.2d 294, 297 (Tex. Civ. App.—Fort Worth 1952, no writ).

9. Allen v. Rodriguez, 480 S.W.2d 270, 271 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.); *see* Carson v. White, 456 S.W.2d 212, 213 (Tex. Civ. App.—San Antonio 1970, writ ref'd n.r.e.).

10. *See* Henry S. Miller Co. v. Evans, 452 S.W.2d 426, 431-32 (Tex. 1970); Messer v. Johnson, 422 S.W.2d 908, 912 (Tex. 1968).

11. Paxton v. Spencer, 503 S.W.2d 637, 642 (Tex. Civ. App.—Corpus Christi 1973, no writ); N.H.A., Inc. v. Jones, 500 S.W.2d 940, 944 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.); Page v. Baldon, 437 S.W.2d 625, 629 (Tex. Civ. App.—Dallas 1969, writ ref'd n.r.e.).

12. TEX. REV. CIV. STAT. ANN. art. 7425b-7 (1960).

13. Atkins v. Carson, 467 S.W.2d 495, 500 (Tex. Civ. App.—San Antonio 1971, writ ref'd n.r.e.); Murphy v. Johnson, 439 S.W.2d 440, 442-44 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ); Roe v. Palmer, 277 S.W.2d 781, 783 (Tex. Civ. App.—Texarkana 1955, no writ); *see* Star v. Ripley, 265 S.W.2d 225, 232 (Tex. Civ. App.—Austin 1954, no writ).

14. Murphy v. Johnson, 439 S.W.2d 440, 444 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ); Rowe v. Palmer, 277 S.W.2d 781, 783 (Tex. Civ. App.—Texarkana 1955, no writ); *see* Star v. Ripley, 265 S.W.2d 225, 232 (Tex. Civ. App.—Austin 1954, no writ).

15. Stone v. Parker, 446 S.W.2d 734, 736 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.); Berry v. Rhine, 205 S.W.2d 632, 634 (Tex. Civ. App.—Fort Worth 1947, no writ).

created in favor of the payor.[16] This rule has been modified to the extent that when a party provides the consideration for the property, and the title vests in one who is the natural object of the payor's bounty, the transaction is considered a gift.[17]

Other presumptions relate to transactions between family members. Property that is acquired during a marriage in the name of both spouses is presumed to be community property.[18] On the other hand, if one party to the marriage acquires property with funds from his separate estate, or if land is conveyed to the spouse's separate estate, the property can thereby be proved to be separate property.[19] It should be emphasized that these presumptions can result in an insurmountable burden of proof in some situations.[20] Parties to a transaction are often precluded from introducing evidence which conflicts with the instrument of conveyance;[21] consequently, if title is presumed to be in one party, and the burden of proof is on a party who cannot introduce parol evidence, the presumption has in effect excluded the evidence.[22]

ELEMENTS OF THE TRANSACTION

The admissibility of evidence to establish a resulting trust, while dependent on the "external influences" of presumptions and the parol evidence rule, is even more closely related to the elements of the transaction itself. These "internal elements"—the nature of the consideration, the nature of the estate conveyed, and the relationship of the parties—constitute the criteria used by the courts to determine the admissibility of parol evidence.[23] These elements are so interrelated that they defy separate analysis. For this reason, it is

16. Allen v. Rodriguez, 480 S.W.2d 270, 271 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.); Carson v. White, 456 S.W.2d 212, 213 (Tex. Civ. App.—San Antonio 1970, writ ref'd n.r.e.).

17. Layva v. Pacheco, 163 Tex. 638, 642, 358 S.W.2d 547, 550 (1962).

18. TEX. FAMILY CODE ANN. § 5.02 (1975).

19. Messer v. Johnson, 422 S.W.2d 908, 912 (Tex. 1968); Hodge v. Ellis, 268 S.W. 2d 275, 282 (Tex. Civ. App.—Fort Worth), *rev'd on other grounds*, 154 Tex. 341, 277 S.W.2d 900 (1954).

20. *See* Messer v. Johnson, 422 S.W.2d 908, 912 (Tex. 1968).

21. *See id.* at 912; Jackson v. Hernandez, 155 Tex. 249, 251, 285 S.W.2d 184, 187 (1955); Lindsay v. Clayman, 151 Tex. 593, 596-98, 254 S.W.2d 777, 780 (1952); Loeb v. Wilhite, 224 S.W.2d 343, 345 (Tex. Civ. App.—Dallas 1949, writ ref'd n.r.e.).

22. If a grantor uses contractual consideration to convey property to a grantee in an absolute warranty deed, a presumption will arise that the property is the grantee's and the grantor will be unable to contradict the written instrument to show it was based on a prior oral agreement establishing a trust. Jackson v. Hernandez, 155 Tex. 249, 256, 285 S.W.2d 184, 188 (1955). The parol evidence rule would make it impossible for the grantor to sustain the burden of proving a resulting trust.

23. *See, e.g.*, Jackson v. Hernandez, 155 Tex. 249, 253-59, 285 S.W.2d 184, 187-90 (1955); Lindsay v. Clayman, 151 Tex. 593, 596-98, 254 S.W.2d 777, 780 (1952); Loeb v. Wilhite, 224 S.W.2d 343, 345-46 (Tex. Civ. App.—Dallas 1949, writ ref'd n.r.e.).

more logical to examine illustrative cases to analyze the reasoning of the courts and the development of the law.

In *Kahn v. Kahn*,[24] the Texas Supreme Court held that where a husband transfers property to his wife as part of her separate estate, parol evidence is inadmissible to establish a parol trust in the property.[25] The court held that the nature of the estate conveyed evidenced an intent to convey the property to the wife's separate estate, and for this reason parol evidence was inadmissible.[26] In distinguishing the rule which allows parol evidence to show the "true consideration,"[27] the court relied on the nature of the stated consideration.[28] It was held that parol evidence could be admitted only where the consideration in the instrument was, "stated as a fact, but not where the recital is contractual in its nature."[29] Based on this reasoning all parol evidence was excluded. The court also discussed the rules which would admit evidence to rebut the presumption that the property was the separate property of the wife.[30] The court limited the application of the rules to situations in which the intention of the parties was not shown in the deed.[31] The relationship of the parties was discussed only in general terms, but it is clear from the nature of the estate conveyed and the language used by the court that the rules established in this case were intended to apply only to the immediate parties to the instrument, that is, the grantor and the grantee.[32]

The Commission of Appeals subsequently considered a very similar case.

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24. 94 Tex. 114, 58 S.W. 825 (1900).

25. *Id.* at 117, 58 S.W. at 826-27. The instrument of conveyance stated that the consideration was paid out of the wife's separate estate.

26. *Id.* at 117, 58 S.W. at 826-27.

27. *Id.* at 119, 58 S.W. at 827. The rule that allows the true consideration to be shown in conveyances where there is no contractual consideration is well settled. Anderson v. McRae, 495 S.W.2d 351, 361 (Tex. Civ. App.—Texarkana, 1973, no writ); Van Zandt v. Van Zandt, 451 S.W.2d 322, 326 (Tex. Civ. App.—Houston [1st Dist.] 1970, writ dism'd); Tarrant v. Schulz, 441 S.W.2d 868, 870 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.). Contractual consideration in Texas involves the payment of cash and the assumption of payments or a debt. Kidd v. Young, 144 Tex. 322, 325, 190 S.W.2d 65, 66 (1945).

28. Kahn v. Kahn, 94 Tex. 114, 119, 58 S.W. 825, 827 (1900).

29. *Id.* at 119, 58 S.W. at 827. The distinction between consideration stated as a fact and contractual consideration is that in contractual consideration the grantee is assuming a legal obligation to pay, such as a note or installment contract, whereas with a recital of consideration as fact, "[t]en dollars and other valuable consideration," there is no contractual assumption to pay.

30. *Id.* at 117-18, 58 S.W. at 826. *Kahn* stated that where a husband had conveyed property to his wife it was presumed to be a gift, but where the instrument of conveyance failed to show the intent of the parties, the husband could use parol evidence to prove a trust in favor of the community estate by showing that community funds were used to buy the property. *Id.* at 117-18, 58 S.W. at 826. *Messer* stated that where the husband was not a party to the conveyance, parol evidence could be used to show the community estate paid the consideration. Messer v. Johnson, 422 S.W.2d 908, 912 (Tex. 1968).

31. Kahn v. Kahn, 94 Tex. 114, 118, 58 S.W. 825, 826 (1900).

32. *See id.* at 119-20, 58 S.W. at 827.

In *McKivett v. McKivett*,[33] a husband conveyed property to the wife's separate estate for $10.00 and the assumption of certain notes. Texas recognizes a cash payment and an assumption of debt as contractual consideration.[34] This consideration was paid from the wife's separate estate, creating a situation very similar to the conveyance in *Kahn*.[35] The court relief heavily on *Kahn* and held that where parties to the instrument have made particular contractual recitations, that is, recitations concerning the nature of the estate conveyed—the wife's separate estate—and the contractual consideration, they will be estopped to deny them.[36] The court in *McKivett*, in attempting to clarify this rule relating to contractual recitations, stated that its decision and the *Kahn* decision were identical in principal to the rule which excluded parol evidence to show consideration different from the contractual consideration named in the instrument.[37] This principle provides that no parol evidence may be admitted to contradict any contractual recitation in the instrument.[38] The particular contractual recitation used to exclude parol evidence in *McKivett* and *Kahn* was the specific conveyance of the property to the separate estate of the wife.[39] Although both *Kahn* and *McKivett* considered the nature of the consideration, the cases were decided on the specific contractual recitations relating to the nature of the estate conveyed and the relationship of the parties.

As a result of the language used in *McKivett*, contractual consideration was no longer considered merely another contractual recitation, but was given a significance of its own. *Kahn* and *McKivett* did not base the inadmissibility of parol evidence on the special importance of contractual consideration, but rather on the principal that because of the parol evidence rule, a grantor would not be allowed to contradict particular contractual recitations in the instrument of conveyance.[40] While not abandoning other criteria in determining the admissibility of parol evidence, later cases emphasized the importance of contractual consideration.[41] In *Kidd v. Young*,[42] a case where the

33. 123 Tex. 298, 70 S.W.2d 694 (1934).

34. Jackson v. Hernandez, 155 Tex. 249, 253, 285 S.W.2d 184, 186 (1955); Kidd v. Young, 144 Tex. 322, 325, 190 S.W.2d 65, 66 (1945) (assumption of an outstanding indebtedness); *see* Lindsay v. Clayman, 151 Tex. 593, 594, 254 S.W.2d 777, 778 (1952) (installment contract); McKivett v. McKivett, 123 Tex. 298, 301, 70 S.W.2d 694, 696 (1934).

35. McKivett v. McKivett, 123 Tex. 298, 301, 70 S.W.2d 694, 695 (1934).

36. *Id.* at 300, 70 S.W.2d at 695-96.

37. *Id.* at 301, 70 S.W.2d at 695.

38. *Id.* at 301, 70 S.W.2d at 695-96.

39. *Id.* at 301, 70 S.W.2d at 696; Kahn v. Kahn, 94 Tex. 114, 119, 58 S.W. 825, 827 (1900).

40. McKivett v. McKivett, 123 Tex. 298, 301, 70 S.W.2d 694, 696 (1934); Kahn v. Kahn, 94 Tex. 114, 119, 58 Tex. 825, 827 (1900).

41. Lindsay v. Clayman, 151 Tex. 593, 254 S.W.2d 777 (1952); Loeb v. Wilhite, 224 S.W.2d 343 (Tex. Civ. App.—Dallas 1949, writ ref'd n.r.e.).

42. 144 Tex. 322, 190 S.W.2d 65 (1945).

parents conveyed property to their children by an absolute warranty deed reciting contractual consideration, the court held parol evidence inadmissible to establish a resulting trust in favor of the mother.[43] As in *Kahn* and *McKivett*, *Kidd* involved a situation in which the grantor attempted to impose a resulting trust on the grantee. The court stated that "when the consideration expressed in a deed or other contract is contractual . . . parol evidence is not admissible to contradict or vary the consideration so expressed, if the result would be to change or defeat the legal operation and effect of the instrument."[44] That this rule was to be applied only as between the parties to the instrument was re-emphasized, although the precise language of the court stated that *any* attempt to impose a trust on the grantee would make the rule applicable.[45] All the cases cited in *Kidd* as supporting this rule involved suits between parties to the instrument,[46] and *Kidd* has been interpreted to apply only in that situation.[47]

These cases involving the admissibility of parol evidence were contested only by the parties to the instrument of conveyance. The parol evidence rule was extended to include other parties to the transaction in *Loeb v. Wilhite*.[48] Although an original grantor conveyed property to the separate estate of the wife with contractual consideration recited in the instrument, the husband, because he had participated in the transaction, was not allowed to introduce parol evidence to prove that the property should belong to the community.[49] The court reasoned that where a deed was made with the knowledge and consent of the husband, he should not be permitted to contradict the terms of the deed with parol evidence.[50] It is difficult to determine the weight the court assigned to the various criteria, but the basis of the decision rested on the intent of husband at the time of the conveyance. The court stated that it was clear that at the time of conveyance the husband knew and consented to the property becoming part of the wife's separate estate.[51] It also emphasized the importance of the contractual consideration and stated that where a third party is in privity with one of the parties to the instrument of conveyance, and the conveyance is executed as the third party intended, he would be bound to the terms of the deed if the consideration was contractual.[52]

43. *Id.*
44. *Id.* at 325, 190 S.W.2d at 66.
45. *Id.* at 325, 190 S.W.2d at 66.
46. McKivett v. McKivett, 123 Tex. 298, 70 S.W.2d 694 (1934); Kahn v. Kahn, 94 Tex. 114, 58 S.W. 825 (1900); Small v. Brooks, 163 S.W.2d 236 (Tex. Civ. App.—Austin 1942, writ ref'd w.o.m.), Hillman v. Graves, 134 S.W.2d 436 (Tex. Civ. App.—San Antonio 1939, no writ).
47. Jackson v. Hernandez, 155 Tex. 249, 255, 285 S.W.2d 184, 187-88 (1955).
48. 224 S.W.2d 343 (Tex. Civ. App.—Dallas 1949, writ ref'd n.r.e.).
49. *Id.* at 346.
50. *Id.* at 346.
51. *Id.* at 345.
52. *Id.* at 346.

Parol evidence was also held inadmissible in *Lindsay v. Clayman*,[53] where a husband sought to impose a resulting trust on the wife's separate property in favor of the community estate. Although the husband's name appeared in the contract of sale, the property was considered to be the separate estate of the wife because the contract provided for installment payments out of the wife's separate estate.[54] The elements that had been present in *Loeb*—contractual consideration, privity between the party asserting the trust and one of the parties to the instrument, and the conveyance to the wife's separate estate—were present in *Lindsay*. The court remarked that "[s]ince the deed states the nature of the estate conferred upon the wife and the consideration being contractual, parol evidence is not admissible to contradict or vary the deed . . . ."[55] Thus, the requirements both of contractual consideration and of a conveyance to the wife's separate estate seem necessary to exclude parol evidence. The distinction between the *Lindsay* and *Loeb* cases is that in *Lindsay*, the husband's name appeared in the contract of sale, and therefore he could not have been a grantor even if he had been in privity with the parties to the transaction.[56] The husband in *Loeb*, however, actively participated in the transaction and was in reality the party who initiated it.[57] The court in *Lindsay* ignored the difference between the roles of each husband in the transaction and held that because the husband's name appeared on an instrument, he was bound by its recitals.[58] But the basis for including the husband as a party to the transaction relates to his participation in the written agreement.[59] Thus, the better rule would have been to consider the husband's part in the transaction, rather than automatically holding him in privity merely because his name appeared in an instrument of the conveyance. Thus, if the rule were changed to allow parol evidence to establish the extent of a party's participation in a transaction, then persons who had

53. 151 Tex. 593, 254 S.W.2d 777 (1952).

54. *Id.* at 596, 254 S.W.2d at 779.

55. *Id.* at 598-99, 254 S.W.2d at 780.

56. *Id.* at 597-98, 254 S.W.2d at 780. The court did not consider the parties' relationships as grantees and grantors. This might be a valid consideration in light of the basis for the parol evidence rule which prohibits a person from contradicting his earlier written statements by the use of parol evidence. When a party is associated with a transaction by name only, the statements in the instrument are not his own and he may not even consent to all the provisions.

57. Loeb v. Wilhite, 224 S.W.2d 343, 345 (Tex. Civ. App.—Dallas 1949, writ ref'd n.r.e.). When trying to establish a resulting trust, the situation is different when a party is a "constructive grantor." If the courts base their decisions on knowledge, consent and inducement, this person should be held to be a party since all of the prerequisites are met. Equity is not ignored in this situation because the language that is sought to be contradicted is the language of the person being made a party. The "constructive grantor" in most cases set the transaction in motion and the language in the written instrument is either his or was drafted according to his wishes; therefore, he should be estopped to contradict the instrument.

58. Lindsay v. Clayman, 151 Tex. 593, 597-98, 254 S.W.2d 777, 780 (1952).

59. *Id.* at 597-98, 254 S.W.2d at 780. The husband's name appeared only in the contract of sale and was not present in the deed. *Id.* at 597-98, 254 S.W.2d at 780.

actively participated could be considered included in the transaction, precluding them from introducing parol evidence. Conversely, parties whose names appeared in the instrument but did not actively participate in the transaction could be protected through the admission of extrinsic evidence.

The question of whether contractual consideration alone is sufficient to preclude parol evidence was initially decided in *Knox v. Long*,[60] in which a husband and wife paid valuable consideration for the property, but the title vested in their son. The deed did not convey the property specifically to the son's beneficial use, and, because the suit was brought by an heir of the grantor, the trust was not based on a relationship between the parties to the suit.[61] Even though the husband and wife had paid 80 percent of the purchase price, parol evidence was not admitted, and the resulting trust failed. The court held that the grantor's heir was in privity with the husband in the original transaction, and, because contractual consideration was recited, parol evidence was inadmissible.[62] Thus, contractual consideration was held to preclude parol evidence in a situation where the party trying to admit the evidence was not a party to the instrument, where the nature of the estate conveyed was not mentioned in the deed, and where parol evidence did not contradict the instrument of conveyance.[63]

The Texas law of parol evidence in relation to resulting trusts was thoroughly discussed in *Jackson v. Hernandez*[64] in which the supreme court reviewed earlier cases, interpreting the law as it existed at that time. The suit was brought by a daughter against her sister for partition of property belonging to their mother. The defendant sought to establish that she was the beneficiary of a resulting trust because she had paid the purchase price for the land which was then conveyed to her mother. The agreement between the mother and daughter had been oral, and the daughter's name did not appear on any written instrument related to the conveyance. There was no provision in the deed relating to the nature of the estate conveyed, but the consideration was contractual.

The court proposed several rules for determining the admissibility of parol evidence, based on contractual consideration, the relationship between the parties, and the nature of the estate conveyed. It was determined that if there was contractual consideration recited in the deed, the court would consider the relationship of the parties in deciding the admissibility of parol evidence.[65] If there was no recital of contractual consideration, then the court would examine the nature of the estate conveyed in order to resolve the parol

60. 152 Tex. 291, 257 S.W.2d 289 (1953).
61. *Id.* at 303-304, 257 S.W.2d at 297.
62. *Id.* at 303, 257 S.W.2d at 297.
63. *Id.* at 303-304, 257 S.W.2d at 297.
64. 155 Tex. 249, 285 S.W.2d 184 (1955).
65. *See id.* at 255-59, 285 S.W.2d at 188-90.

evidence question.[66]

The opinion initially examined the effect of contractual consideration in the instrument of conveyance. In reaffirming *Kidd*, the court stated that when an instrument recites contractual consideration, evidence of a prior or contemporaneous agreement between the grantor and grantee that the grantee will hold the property in trust for a third person is not admissible.[67] It was reasoned that when contractual recitations of consideration are used, the entire agreement of the parties is contained in the instrument; therefore, proof of a contemporaneous agreement could have no effect other than to vary or add to the contractual consideration by showing that the intent was to transfer the property for a different purpose.[68]

Although accepted in Texas,[69] the rule excluding parol evidence solely on the basis of contractual consideration may render the intention of the parties ineffective. The rule is based on presumptions that can easily be misinterpreted. For example, there is a presumption that the contemporaneous agreement could have no effect other than to vary the consideration in the instrument.[70] *Jackson* discussed consideration only in the terms of monetary consideration, and although most prior agreements would vary the monetary consideration, there are situations where prior or contemporaneous agreements would be related to other aspects of the instrument, such as the nature of the estate conveyed. The possibility also exists that a prior oral agreement would concur exactly with the monetary consideration stated in the written instrument. If another contractual consideration was varied by the oral agreement, parol evidence would not be admissible despite its conformity with the monetary consideration. The contractual consideration used in the *Jackson* rule should not be interpreted to apply only to monetary contractual consideration.

The second presumption on which the contractual consideration rule is based is that because contractual consideration is used, the entire agreement of the parties is contained in the written instrument.[71] The written instrument *might* contain the entire agreement of the parties; contractual consideration alone, however, does not insure the instrument includes the entire agreement. There are situations in which parties would not want the true intent or effect of the conveyance to be included in the written instrument.[72] Cir-

66. *See id.* at 257-59, 285 S.W.2d at 189-90.
67. *Id.* at 256, 285 S.W.2d at 188.
68. *Id.* at 256, 285 S.W.2d at 188.
69. *Id.* at 256, 285 S.W.2d at 188. The rule affirmed in *Jackson* precludes parol evidence as to the relationship of the parties if only contractual consideration is stated.
70. *Id.* at 256, 285 S.W.2d at 188.
71. *Id.* at 256, 285 S.W.2d at 188.
72. This idea was accepted in Messer v. Johnson, 422 S.W.2d 908, 911-12 (Tex. 1968). The court concluded that although a situation could exist where intent of the parties was to "clothe" the grantee with the appearance of ownership while holding the property in trust, the situation was not applicable to the immediate facts. *Id.* at 912.

cumstances also exist where there is no practical way to transfer the property other than by an assumption of indebtedness or by installment payments. When this contractual consideration is recited in the written instrument, parol evidence is inadmissible regardless of whether it varies the consideration. Interestingly, if the same circumstances existed and the consideration was recited as a fact, parol evidence would be admissible to establish the prior agreement.

The cases relied on in *Jackson* for the formation of the contractual consideration rule also involved specific recitations of the nature of the estate conveyed.[73] The contractual consideration rule stated in *Jackson*, however, was to be applicable regardless of the inclusion of such a provision in the deed.[74] In a discussion of the nature of the conveyance, the two earlier cases, *Loeb v. Wilhite*[75] and *Lindsay v. Clayman*,[76] were said to have been based on the recital of the estate conveyed and not the recitation of contractual consideration.[77] Although these earlier opinions had actually applied all three elements in reaching their decisions as to the admissibility of parol evidence, the nature of the estate was deemed paramount in the interpretation given these cases by the court in *Jackson*.[78] The court concluded that when parties to an instrument convey an absolute deed which either expressly or impliedly stipulates that the grantee shall be the beneficial owner of the property, parol evidence will not be admitted to prove a prior or contemporaneous agreement that the grantee would hold the property in trust for a third person.[79] This is true even if the third party, by virtue of participation in the transaction, is a party to the instrument.[80] This second *Jackson* rule, the nature of the estate, was based on the *Loeb* and *Lindsay* cases, in both of which the contemporaneous agreement was made between the third party (the husband) and the grantee (the wife.)[81]

While this "estate" rule is undoubtedly logical, its effect seems to ignore the two cases used as the basis of its creation. In both *Loeb* and *Lindsay*, the courts emphasized the aspect of contractual consideration. The court in *Jackson*, when proposing its estate rule, not only stated that the contractual consideration was not the basis of the law, but also completely excluded this

73. Kidd v. Young, 144 Tex. 322, 190 S.W.2d 65 (1945) (an absolute deed); McKivett v. McKivett, 123 Tex. 298, 70 S.W.2d 694 (1934) (recitation was to the wife's separate property); Kahn v. Kahn, 94 Tex. 114, 58 S.W. 825 (1900) (recitation was to the wife's separate property).

74. *See* Jackson v. Hernandez, 155 Tex. 249, 256, 285 S.W.2d 184, 188 (1955).

75. 224 S.W.2d 343 (Tex. Civ. App.—Dallas 1949, writ ref'd n.r.e.).

76. 151 Tex. 593, 254 S.W.2d 777 (1952).

77. Jackson v. Hernandez, 155 Tex. 249, 257, 285 S.W.2d 184, 189 (1955).

78. *Id.* at 257, 285 S.W.2d at 189.

79. *Id.* at 257, 285 S.W.2d at 189.

80. *Id.* at 257, 285 S.W.2d at 189.

81. Lindsay v. Clayman, 151 Tex. 593, 594-95, 254 S.W.2d 777, 778 (1952); Loeb v. Wilhite, 224 S.W.2d 343, 344-45 (Tex. Civ. App.—Dallas 1949, writ ref'd n.r.e.).

element from the rule concerning the nature of estates.[82] As a result of this exclusion, both the contractual consideration rule and the estate rule can be applied independently, and parol evidence is excluded by a contractual recitation of *either* the consideration or the estate conveyed.

In *Jackson* the court, overruling *Knox v. Long*,[83] considered the relationship of the parties and held that where there is a recital of contractual consideration standing alone, parol evidence of a prior or contemporaneous agreement between the grantee and a third party would be admissible if the third party's payment of the consideration gave rise to a resulting trust in favor of the third party.[84] The distinction between this rule and the rule adopted from *Kidd* turns on the relationship of the parties. In *Kidd* it was the grantor who sought to impose the trust, while in *Jackson* it was actually a third party who did so.

A controlling issue in the admissibility of parol evidence when contractual consideration is recited is the designation of "a party to the transaction." It is clear that when the grantor is a litigant in a suit to impose a trust upon the grantee, parol evidence will not be admitted.[85] Parol evidence has also been held inadmissible when the name of the party attempting to establish the resulting trust appears in an instrument of the conveyance.[86] The better rule would be to allow extrinsic evidence of intent to become a party to the transaction so that the jury could then determine the status of the parties. The relationship of the parties should also be a factor in determining the parties to the transaction. If a party is a grantor, he has participated in the transaction: the language in the conveyance is his own and will bind him to the agreement. If the party seeking to establish a trust is named as a grantee, this shows no participation or agreement with the language of the conveyance. It would be more equitable, for the protection of persons merely named in the conveyance, if their position as grantee or grantor were determined by the jury.

This approach was taken prior to the *Jackson* decision, in *Hodge v. Ellis*,[87] in which a third party conveyed property to the wife, and the husband sought to establish a resulting trust in favor of the community estate. The Texas Supreme Court, in determining whether the husband was a party to the transaction, considered his general knowledge of the situation and the fact that he had joined his wife in signing a deed of trust.[88] It was held as a matter of law that the signing established the husband's consent and knowledge of

82. Jackson v. Hernandez, 155 Tex. 249, 259, 285 S.W.2d 184, 190 (1955).
83. 152 Tex. 291, 257 S.W.2d 289 (1953).
84. Jackson v. Hernandez, 155 Tex. 249, 259, 285 S.W.2d 184, 190 (1955).
85. *Id.* at 256, 285 S.W.2d at 188.
86. Lindsay v. Clayman, 151 Tex. 593, 597-98, 254 S.W.2d 777, 780 (1952).
87. 154 Tex. 341, 277 S.W.2d 900 (1955).
88. *Id.* at 345, 277 S.W.2d at 905.

the transaction and his intent that the land was to be the wife's separate property.[89] The husband was not allowed to introduce parol evidence to prove a resulting trust.[90] The court in *Hodge* did not "automatically" consider the husband a party to the transaction because he had signed a related instrument. This and other evidence was considered to determine the husband's intent as to the nature of the estate at the time of conveyance.[91]

In a case decided after *Jackson, Long v. Knox*,[92] the husband had knowledge of and consented to a third party's transfer of mineral estates to the separate estate of his wife. The court held that where such knowledge and consent to the conveyance can be proved, the intent of the husband will be construed so as to convey separate title to the wife.[93] If this intent is evident, the husband will, in effect, be held to be a party to the transaction, and parol evidence will be inadmissible to rebut the presumption that the property was the separate property of the wife. Thus, the designation as a "party to the transaction" was extended to one who had signed no written instruments of conveyance, but who had known of and impliedly consented to the conveyance. The court was correct in considering the circumstances surrounding the conveyance to determine the husband's intent, but the effect of the rule can make a person a party to the transaction even though he did not actually participate in it.

The basis of the court's reasoning in *Long* involves the intent of the party in relation to the transaction. This intention can be shown by knowledge and consent; the daughter in *Jackson* and the husband in *Long* "participated" in the transaction. In both cases the juries found that the consideration was not paid by the grantee named in the instrument.[94] The deed in *Long* stated that the property was to pass to the wife's separate estate and the *Jackson* deed was an absolute conveyance to the mother by a third party. *Long* held the husband to have had knowledge of the transaction and to have consented to the conveyance being made to the wife's separate estate.[95] In *Jackson* the daughter certainly had knowledge of and consented to the transaction. Neither the husband nor the daughter signed any of the instruments involved in the conveyances. The *Jackson* decision failed to discuss the daughter's relationship to the transaction and dismissed the problem after stating that she had not signed any of the related writings. As a result of the later holding in *Long* that a person may be designated a party to the transaction without having signed any of the instruments of the conveyance,

89. *Id.* at 346, 277 S.W.2d at 905.
90. *Id.* at 345, 277 S.W.2d at 905.
91. *Id.* at 346, 277 S.W.2d at 905-906.
92. 155 Tex. 581, 291 S.W.2d 292 (1956).
93. *Id.* at 588, 291 S.W.2d at 296-97.
94. *Id.* at 583, 291 S.W.2d at 293; Jackson v. Hernandez, 155 Tex. 249, 252, 285 S.W.2d 184, 186 (1955).
95. Long v. Knox, 155 Tex. 581, 588, 291 S.W.2d 292, 296-97 (1956).

the daughter in *Jackson* could now be considered a party to the transaction and therefore subject to the parol evidence rule. The result of *Long* does not substantively affect the *Jackson* rules but does expand the range of situations in which they should be applied. The *Jackson* rule binding any third party who becomes a party to the transaction by the parol evidence rule has been expanded because third parties may now more easily be found to be parties to the transaction.

Recent cases involving the admissibility of parol evidence to prove a resulting trust have adhered to the rules in *Jackson* and have extended them into other fact situations.[96] *Messer v. Johnson*[97] involved a situation in which property was conveyed by a third party to the wife's separate estate, and the husband was named in the transaction as a grantor; no parol evidence was admitted to create a resulting trust in the community estate despite the fact that there was no contractual consideration.[98] The supreme court was urged to relax the parol evidence rule in this area and allow the trust question to be determined as a question of fact based on the intention of the parties.[99] The court declined, however, on the basis that its decision had effected the intention of the parties.[100] The argument raised in *Messer* is similar to the arguments raised by *Jackson*. There are situations in which the parties actually intend for one party to hold property in trust for the community estate, but they attempt to give the appearance that the property is owned separately by one of the parties.[101] The argument for invoking the parol evidence rule is strong in this situation, because to allow the extrinsic evidence would be to allow a party to the instrument to contradict a recital of the instrument. Although the parol evidence rule obviously exists to promote equity in such situations, the evidence should be admitted to the trier of fact to determine its probative value.

In another case, *Van Zandt v. Van Zandt*,[102] the court of civil appeals adopted the rules excluding parol evidence if the conveyance contained contractual consideration and if the property was conveyed to the spouse's separate estate, but held these rules to be inapplicable to the particular fact situation of the case.[103] The court also followed *Long*, finding that the person who had initiated the transaction was thus a party to the transaction.[104]

96. Henry S. Miller Co. v. Evans, 452 S.W.2d 426, 431 (Tex. 1970); Messer v. Johnson, 422 S.W.2d 908 (Tex. 1968); Long v. Knox, 155 Tex. 581, 291 S.W.2d 292 (1956).
97. 422 S.W.2d 908 (Tex. 1968).
98. *Id.* at 912.
99. *Id.* at 911-12.
100. *Id.* at 912.
101. *Id.* at 911-12. The court accepted the validity of this proposition but held that it was "entirely proper" to deny legal effect to such agreements. *Id.* at 912.
102. 451 S.W.2d 322 (Tex. Civ. App.—Houston [1st Dist.] 1970, writ dism'd).
103. *Id.* at 327.
104. *Id.* at 327.

TRANSACTIONS INVOLVING FRAUD

While rules regarding the admissibility of parol evidence to establish a resulting trust are being more widely adopted in some circumstances, other situations exist which make these rules inapplicable. Exceptions to the rule allow parol evidence to be introduced if there is a proper allegation of fraud, accident or mistake.[105] The two situations most frequently encountered in this area include fraud practiced upon creditors and fraud due to a breach of a fiduciary relationship. If one of these fraudulent situations is properly alleged and proven, parol evidence will be admitted to establish the fraud and create a constructive trust in favor of the injured party.[106]

Fraud practiced upon creditors usually involves a situation in which the debtor transfers land to another to be held in trust, but the conveyance on its face indicates that the grantee has both the legal and equitable titles. For instance, in *Letcher v. Letcher*[107] a husband who conveyed property to his wife's separate estate in an attempt to defraud creditors was denied recovery on the basis that even though he conveyed the land without real consideration, he should not be allowed to establish a trust and thus benefit from his own fraud.[108] The court held that in a situation in which property is conveyed to defraud creditors no trust will be enforced against the grantee.[109] The court based its refusal to admit parol evidence on public policy considerations, stating that courts should leave parties to a fraudulent transaction in the position which they have placed themselves.[110] The court failed to discuss the fact that both parties to the suit were also parties to the fraud. As between two defrauding parties public policy should have no application.[111]

The other situation involving fraud generally occurs when a grantor conveys property in an instrument absolute on its face although by a prior oral agreement the grantee is intended to hold the property in trust for the grantor. The basic rule applied in these instances is that where a person occupying a fiduciary relationship fraudulently induces the grantor to convey to him, parol evidence will be admitted to establish the fiduciary relationship and to impose a constructive trust in favor of the grantor.[112] This rule is based on

105. Paxton v. Spencer, 503 S.W.2d 637, 642 (Tex. Civ. App.—Corpus Christi 1973, no writ); N.H.A. Inc. v. Jones, 500 S.W.2d 940, 944 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.); Page v. Baldon, 437 S.W.2d 625, 629 (Tex. Civ. App.—Dallas 1969, writ ref'd n.r.e.).

106. Mills v. Gray, 147 Tex. 33, 39-40, 210 S.W.2d 985, 988-89 (1948); Miller v. Huebner, 474 S.W.2d 587, 591 (Tex. Civ. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.).

107. 421 S.W.2d 162 (Tex. Civ. App.—San Antonio 1967, writ dism'd).

108. *Id.* at 168-69.

109. *Id.* at 168-69.

110. *Id.* at 168-69.

111. *Id.* at 168-69.

112. Mills v. Gray, 147 Tex. 33, 39-40, 210 S.W.2d 985, 988-89 (1948); Mathews v. Mathews, 310 S.W.2d 629 (Tex. Civ. App.—Houston 1958, no writ).

the theory of "constructive fraud" by breach of the fiduciary relationship.[113] While this "constructive fraud" was initially applied only in traditional fiduciary relationships such as that between an attorney and client,[114] the term fiduciary has been extended to include any personal relationship involving trust between the parties.[115] This "personal relationship," however, must exist apart from and prior to the transaction on which the suit is based.[116] In these situations a constructive trust has prevented defrauding parties from becoming unjustly enriched due to the inability of an innocent party to prove a trust by means other than parol evidence.

CONCLUSION

Resulting trusts are a tool of equity, but due to the restrictive nature of rules which preclude the admission of extrinsic evidence to prove these trusts, there is little equity in real property conveyances. The arbitrary application of rules which exclude parol evidence on the basis of contractual recitations ignores the intent of the parties and removes facts which could be used to fashion a more equitable result from the consideration of the jury. The admission of parol evidence to establish a resulting trust, however, would not be a "cure-all" in real property conveyances. Some parties would undoubtedly take advantage of the rule and attempt to prove fictitious agreements between parties, but, as in other situations, the jury should then weigh the evidence on which it bases its decision. The effect of disallowing extrinsic evidence to prove the existence of a trust places the jury in the position of deciding the case by weighing only part of the facts. The ultimate goal of a court in deciding conveyance questions should be to effect the true intention of the parties at the time of conveyance. By allowing all the evidence to be presented to the jury this intention could be more accurately determined.

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113. Mills v. Gray, 147 Tex. 33, 39-40, 210 S.W.2d 985, 988-89 (1948); Miller v. Huebner, 474 S.W.2d 587, 591 (Tex. Civ. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.); Mathews v. Mathews, 310 S.W.2d 629 (Tex. Civ. App.—Houston 1958, no writ).

114. Mills v. Gray, 147 Tex. 33, 39-40, 210 S.W.2d 985, 988-89 (1948).

115. *See* Meadows v. Bierschwale, 516 S.W.2d 125, 128 (Tex. 1974); Miller v. Huebner, 474 S.W.2d 587, 591 (Tex. Civ. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.).

116. Miller v. Huebner, 474 S.W.2d 587, 591 (Tex. Civ. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.).