Title

Why probate fiduciaries still need a working knowledge of the purchase-money resulting trust and its functional equivalent

Text

As a practical matter, equity's purchase money resulting trust (PMRT) is a fancy term for application of unjust-enrichment doctrine in situations where X purchases property, but Y takes legal title to it. If Y is unjustifiably enriched thereby, Y holds the property upon a PMRT for the benefit of whoever should have it. Was X's intent donative? There is a presumption that it was not. If there was donative intent, no PMRT. Y gets to keep the property. Unlike an express trust of land, a PMRT of land is exempt from the writing requirement of the statute of frauds applicable to trusts. So is the constructive trust. *See generally* §8.15.5 of *Loring and Rounds: A Trustee's Handbook* (2023) (statute of frauds), available for purchase at Loring and Rounds: A Trustee's Handbook, 2023 Edition | Wolters Kluwer Legal & Regulatory. Section reproduced in appendix below. The number of PMRT decisions that have been handed down by English and U.S. courts over the centuries is huge.

Long before Lord Mansfield in 1750, via *Moses v. Macferlan*, had planted the seeds of unjust enrichment doctrine in England's legal system, resulting "uses" were ubiquitous, the use being a precursor to the modern trust. In England, during the 15th and 16th centuries, the practice of conveying legal title to land with a reservation of beneficial interest became so common that the usual inference was that a gratuitous conveyance of land was subject to a retained use. The courts held that the transferee who gave no consideration presumptively held upon a resulting use for the transferor. Today, a gratuitous transfer of property, *ipso facto*, raises no such presumption. The PMRT is a vestige of the old regime.

Consider the 2021 Nebraska case of *Malousek v. Meyer*, 962 N.W.2d 676 (payor deceased, transferee alive). Molly, now deceased, had titled in the name of her stepson a boat she had purchased. Stepson intended to keep the boat. There was no documentation suggesting he should not. The special administrator of Molly's estate asserted the boat was an estate asset, that the stepson was the trustee of a PMRT. The special administrator prevailed due to compelling extrinsic evidence that Molly had titled the boat in the stepson's name for reasons of convenience rather than benefaction. Though there also had been tax reasons why she had not taken title, there had been no illegality. Had there been, "the policy against unjust enrichment of the transferee would have been outweighed by the policy against giving relief to a person who has entered into an illegal transaction." *Id*. He who comes into equity must come with clean hands. Avoiding publicity might be another innocuous reason for a payor not to take title. The personal representative had a fiduciary duty to take control of and secure all property to which the probate estate had been entitled. In the case of a will with a pour-over provision, not our situation, a recipient trustee has a fiduciary duty to see to it that the personal representative reasonably leaves no stone unturned.

In 1830, New York, by statute, abolished the PMRT of land. Several other states followed suit. There is less here than meets the eye. As a practical matter, all that was voided was PMRT's archaic presumption that the payor lacks donative intent. Courts since time immemorial have been end-running these legislative initiatives by defaulting to unjust-enrichment jurisprudence. When a transferee of property has been unjustly enriched due to the absence of donative intent on the part of the purchase-price payor, the procedural equitable remedy of constructive trust is imposed on the property, not a PMRT. *See, e.g.*, Justice Cardozo's decision in *Foreman v. Foreman*, 251 N.Y. 237 (1929) (payor alive, transferee deceased). PMRT doctrine minus the archaic presumption that the payor lacks donative intent renders it

functionally indistinguishable from constructive trust doctrine. *See* Rest. of Restitution §160 (1936). Now that the one-stop jurisprudence of equitable remediation for unjust enrichment via imposition of constructive trust has fully matured, see generally Restatement of Restitution (1936), the PMRT perhaps has outlived its usefulness. It should fall to the courts, however, not the legislatures, to nudge the PMRT into retirement. In the trust space, reform via codification inevitably leads to more doctrinal complexity, redundancy, and confusion.

Appendix

§8.15.5 *Statute of Frauds* [from *Loring and Rounds: A Trustee's Handbook* (2023). Handbook available for purchase at Loring and Rounds: A Trustee's Handbook, 2023 Edition | Wolters Kluwer Legal & Regulatory.]

Creation of the trust. To this day, oral trusts of personal property are generally enforceable.[131] In England before 1676, a trust of real or personal property, with some exceptions, was "averable," *i.e.*, it could be declared by word of mouth.[132] In that year, however, Parliament enacted a statute commonly known as the statute of frauds.[133] Section 7 provided that "all declarations or creations of trusts or confidences of any *lands*, tenements, or hereditaments shall be manifested and proved by some *writing* signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."[134]

The statute did not require that a trust of land be created by a written instrument, merely that it be proved by one.[135] Thus, a writing—perhaps even an oral admission in open court or a revoked will—whose purpose is to assert the unenforceability of an oral trust of land may itself constitute a writing that satisfies the statute's requirements, provided it contains a direct or indirect acknowledgment or admission of the trust's existence.[136] Moreover, if lost or destroyed, the writing itself may be proved by parol (oral) evidence.[137]

Either by case law or by statute, some form of §7 has found its way into the law of most U.S.

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[131] *See, e.g.*, *In re* Est. of Fournier, 902 A.2d 852 (Me. 2006). *See also* Wolff v. Calla, 288 F. Supp. 891, 893 (E.D. Pa. 1968) ("A trust in personal property may be established by parol evidence ….[W]hile no particular form of words or conduct is necessary for the creation of a trust, language or conduct and a manifestation of an intention to create the same must be proven by evidence which is sufficiently clear, precise and unambiguous …."); Snuggs v. Snuggs, 571 S.E.2d 800 (Ga. 2002) (involving an oral trust of personal property established by a grandfather to fund the advanced educations of his four grandchildren).

[132] 1 Scott & Ascher §6.1.

[133] Stat. 29 Chas. II, c.3 (1676).

[134] 1 Scott on Trusts §40 at 413, 414. "The Statute of Frauds required not only that the declaration or creation of a trust of land be manifested and proven by a writing, but also that all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be wholly void and of none effect." 3 Scott & Ascher §14.7 (referring to Stat. 29 Car. II, c. 3).

[135] 1 Scott & Ascher §6.3.2.

[136] 1 Scott & Ascher §6.6.

[137] 1 Scott & Ascher §6.8.

jurisdictions.[138] As a general rule, then, with the exception of the resulting trust[139] and the constructive trust,[140] a trust concerning an interest in land requires a writing if it is to be enforceable.[141] The writing must show with reasonable definiteness the trust property.[142] It also must show the trust beneficiaries and the extent of their interests or the purposes of the trust.[143] While a resulting trust of land may be exempt from the writing requirements of the statute of frauds, an oral *assignment* of the nonpossessory equitable reversionary interest to the trustee most likely would not be.[144] "Just as parol evidence is ordinarily inadmissible to rebut a resulting trust, such evidence should also ordinarily be inadmissible to extinguish a resulting trust."[145]

The writing may consist of several writings[146] and, again, need not be intended as the expression of a trust.[147] Take, for example, a prospective settlor who writes and signs a letter explaining that he or she intends at some time *in the future* to impress a trust by oral declaration on a certain parcel of land. The letter sets forth what the terms of the trust will be. If at some time in the future the trust is declared, the letter will satisfy the writing requirement of the statute of frauds.[148] Also, a corroborating letter written *after* an oral trust of land has been declared will satisfy the writing requirement.[149]

In the case of nondeclarations of trust, the statute of frauds does not require that delivery of the deed or conveyance of the real property to the trustee and the creation of the trust occur simultaneously so long as ultimately there is documentation connecting the property to the trust.[150] For declarations of trust, the writing must be signed by the declarant, *i.e.*, the settlor/trustee.[151] While perhaps desirable, "there is no

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[138]1 Scott & Ascher §6.2.1; 1 Scott on Trusts §§40, 40.1; Restatement (Second) of Trusts §40. *See also* UTC §407 cmt. "The term 'statute of frauds' is used in … [the Restatement (Third) of Trusts]… to refer to all of these rules requiring that inter vivos trusts be created or proved in writing, including those rules that are based on judicial decisions finding the requirement in the common law, and those rules that apply to some or all inter vivos trusts of personal property." Restatement (Third) of Trusts §22 cmt. a.

[139]Restatement (Second) of Trusts §40 cmt. d; 1 Scott & Ascher §6.12 (a written conveyance of land "in trust" that does not specify the trust beneficiaries or its purposes will trigger a resulting trust in favor of the transferor notwithstanding the Statute of Frauds). *See generally* §§3.3 of this handbook (the purchase money resulting trust) and 4.1.1.1 of this handbook (the resulting trust); 6 Scott & Ascher §§40.1 (When a Resulting Trust Arises), 40.2 (The Statute of Frauds and the Resulting *Use*), 40.3 (the Statute of Frauds and the Resulting Trust), 43.1 (The Purchase Money Resulting Trust).

[140]Restatement (Second) of Trusts §40 cmt. d. *See generally* §3.3 of this handbook (covering constructive trust doctrine generally). *See, e.g.*, Turley v. Ethington, 146 P.3d 1282 (Ariz. Ct. App. 2006) ("The statute of frauds would not bar imposition of a constructive trust.").

[141]*See generally* 6 Scott & Ascher §43.1 (The Purchase Money Resulting Trust).

[142]1 Scott & Ascher §6.5.

[143]1 Scott & Ascher §6.5.

[144]*See generally* 6 Scott & Ascher §§41.2 (Rebutting the Resulting Trust), 41.20 (Failure of Express Trust), 42.10 (Trust Fully Performed without Exhausting the Trust Estate).

[145]6 Scott & Ascher §41.20 (Parol Extinguishment). "A different result has been reached, however, when the resulting trust arose wholly by parol, as in the case in which one person paid the purchase price for a conveyance of land to another." 6 Scott & Ascher §41.20 (Parol Extinguishment). *See generally* §3.3 of this handbook (the purchase money resulting trust).

[146]1 Scott & Ascher §6.7.

[147]Restatement (Third) of Trusts §22(2).

[148]1 Scott & Ascher §6.3.1. *See, e.g.*, Orud v. Groth, 708 N.W.2d 72 (Iowa 2006).

[149]1 Scott & Ascher §6.3.2.

[150]*See, e.g.*, Tretola v. Tretola, 61 Mass. App. Ct. 518 (2004) (holding that statute of frauds not violated though trust may not have come into existence until after the real estate had been transferred to the trustee).

[151]Restatement (Third) of Trusts §23(1).

requirement that the settlor/trustee execute a separate writing conveying the property to the trust."[152] For inter vivos transfers in trust from *A* to *B*, either *A* (the settlor)[153] or *B* (the trustee)[154] must sign.[155]

For purposes of the statute, "interests in land" would include leaseholds and condominiums but would not include mortgage notes and stock in cooperative apartments.[156] On the other hand, if the inception assets of an oral trust are personal property, the trustee may subsequently convert them to real property without running afoul of the statute of frauds.[157] The trust would still be enforceable.

If a trustee in reliance upon the statute of frauds refuses to perform an oral trust of land, a constructive trust may arise in favor *of the settlor*, a topic we take up in §3.3 of this handbook.[158] The Restatement (Third) of Restitution and Unjust Enrichment suggests that alternatively a constructive trust could arise in favor not of the settlor but *of the designated beneficiaries of the oral trust*. Unjust enrichment principles ought to extend to intended third-party beneficiaries of unenforceable promises is the thinking.[159] Also, courts have enforced oral trusts of land when there has been part performance.[160] A trustee who elects to perform an oral trust of land may do so over the objections of his personal creditors, but not his trustee in bankruptcy.[161]

Also in §3.3 of this handbook we discuss the purchase money resulting trust, an express trust/resulting trust hybrid which, like the constructive trust, is exempt from the statute of frauds writing requirement, even when land is involved.[162] "Six years after enactment of the Statute of Frauds, it was decided that 'When a man buys Land in another name, and pays Mony, it will be a Trust for him that pays the Mony, tho' no Deed declaring the Trust; for the Statute of 29 Car. 2, called Statute of Frauds, doth not extend to Trusts, raised by Operation of the Law.'"[163] So too a purchase money resulting trust of land may be *rebutted* by parol evidence that a gift to the grantee was actually intended.[164] Or if a gift to the grantee was not intended *at the time of purchase*, the weight of authority is that the payor subsequently may orally surrender his or her equitable interest in the land in favor of the grantee, *i.e.*, in favor of the trustee of the purchase money resulting trust.[165] An oral assignment of the beneficial interest *to a third person*, however, would be invalid under the statute of frauds.[166]

The ERISA statute of frauds is all-inclusive: Section 402(a)(1) of ERISA requires that "every employee

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[152]Heggstad v. Heggstad (*In re* Est. of Heggstad), 16 Cal. App. 4th 943, 948 (1993).

[153]1 Scott & Ascher §6.4.1 (noting, however, that a writing signed by the settlor after the transfer would not satisfy the statute of frauds as the settlor would not then have been in a position to declare a trust).

[154]1 Scott & Ascher §§6.4.2 (Trustee Signs Prior to or at the Time of Transfer), 6.4.3 (Trustee Signs after Transfer).

[155]Restatement (Third) of Trusts §23(2).

[156]Restatement (Third) of Trusts §22 cmt. b; 1 Scott & Ascher §6.2.2.

[157]1 Scott & Ascher §6.15.1.

[158]1 Scott & Ascher §6.9.

[159]Restatement (Third) of Restitution and Unjust Enrichment §31 cmt. g.

[160]1 Scott & Ascher §6.13.

[161]1 Scott & Ascher §6.14. *See generally* §7.4 of this handbook (trustee's discharge in bankruptcy).

[162]*Cf.* 6 Scott & Ascher §43.2.2 (Unenforceable Express Agreement by Grantee to Hold in Trust).

[163]6 Scott & Ascher §43.1.1 (quoting Anonymous, 2 Vent. 361 (1683)).

[164]6 Scott & Ascher §43.2. "In contrast, a resulting trust that arises because of the failure of an express trust declared in a will or other written instrument ordinarily cannot be rebutted by the settlor's oral statements." 6 Scott & Ascher §43.2. *See generally* §3.3 of this handbook (the purchase money resulting trust).

[165]*See generally* 6 Scott & Ascher §43.14 (Parol Extinguishment).

[166]*See generally* 6 Scott & Ascher §43.14 (Parol Extinguishment).

benefit plan shall be maintained pursuant to a written instrument."[167] On the other hand, under the UTC, the creation of an oral trust even of land can be established by clear and convincing evidence.[168]

Still, unless an interest in land is involved, an inter vivos trust can arise orally: "Except as required by a statute of frauds, a writing is not necessary to create an enforceable inter vivos trust, whether by declaration, by transfer to another as trustee, or by contract."[169] Some jurisdictions, however, most notably Florida,[170] now have statutes requiring that certain inter vivos trust instruments be executed with testamentary formalities, even when the subject matter is personal property.[171] It remains to be seen what effect such statutes will have on the enforceability of informal trusts, particularly in cases where the manifestation of intention to impose equitable duties is merely the conduct of the parties.[172] If such trusts have been rendered unenforceable by this legislation, then we await to see how the courts will deal with the inevitable unjust enrichment issues.

Transfer of equitable interest. As noted above, the original Statute of Frauds enacted by Parliament in 1676 required that the creation of an express trust of land by declaration or otherwise must be manifested and proven by a writing to be effective. The statute, in addition, however, provided that the transfer of an equitable or beneficial interest in a trust of land also would no longer be effective without a writing.[173] In a number of, but not all, states (U.S.), the statute of frauds likewise also covers *transfers of equitable interests* under trusts,[174] including most likely equitable reversionary interests.[175] "In some states a writing is required for a transfer of the beneficiary's interest in a trust of land only; in some a writing is required for the transfer of a beneficial interest in any trust."[176] In either case, there is no dispute that it is the assigning beneficiary who must sign the writing: "We have seen that difficult questions may arise as to who is the proper party to sign the writing that evidences the creation of a trust. No similar difficulty arises in the case of the assignment of a beneficial interest. It is the beneficiary who makes the assignment, and that beneficiary alone, who may sign the memorandum, whether at the time of the assignment or thereafter. Whether the beneficiary's agent may sign depends on both the language of the statute and the scope of the agent's authority."[177]

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[167]*See* Frahm v. Equitable Life Assurance Soc'y, 137 F.3d 955, 958 (7th Cir. 1998) (suggesting that §402(a)(1) of ERISA is "a long way toward a statute of frauds").

[168]UTC §407.

[169]Restatement (Third) of Trusts §20.

[170]Fla. Stat. Ann. §737.111.

[171]1 Scott & Ascher §6.15.

[172]*See generally* 1 Scott & Ascher §4.1.

[173]3 Scott & Ascher §14.7.

[174]3 Scott & Ascher §14.7, n.6 & n.7.

[175]*See generally* 6 Scott & Ascher §41.20.

[176]Restatement (Third) of Trusts §53 cmt. a.

[177]3 Scott & Ascher §14.7.