

Title

A trust in mid-course is declared void *ab initio* by the equity court: What now happens to the property?

Text

Assume an irrevocable inter vivos trust has been up and running for some time now, at least it has the outward trappings of a trust. It was ostensibly created not via declaration but via a transfer of property from the settlor to someone other than the settlor. Finding that the property owner had been induced by, say, fraud to make the transfer, the equity court declares the trust void as of the time of transfer. What then is the fate of the property that is currently in the hands of the transferee?

First, let it be said that a trust, *qua* trust, is not a contract, the former being a creature of equity, the latter a creature of law. Most trusts in the noncommercial space will arise via donative transfer rather than via an exchange of consideration. One may acquire enforceable equitable property rights incident to a trust relationship although one lacks the competency, whether due to minority, mental incapacity, or current non-existence, to contract. A trust shall not fail for want of a trustee. One could go on and on. The trust relationship is *sui generis*. See generally §8.22 of *Loring and Rounds: A Trustee's Handbook* (2022) for more on why this is the case.

Thus, the fate of the property in the hands of the transferee-who-never-was-a-trustee is in the hands of equity, which has been in the business of dealing with such situations for centuries. See §8.15.78 of the *Handbook* (2022). We have here a clear case of unjust enrichment. The beneficiaries of the property transfer, whether innocent or not, have been unjustly enriched by the fraud. The subject property needs to be secured for the victims of the fraud. That is where the constructive trust comes in. The equity court issues a decree, personal to the transferee, that he/she is now a constructive trustee of the property. The practical consequence of the imposition of a constructive trust is that the property is now frozen in place. The equity court then issues an *in personam* specific-performance restitution order to the constructive trustee to transfer the legal title back to the transferor, to his personal representative, *or to whomever now is lawfully entitled to the title*.

Now, one may ask, what then was the state of the legal title in the interim between the unjust enrichment event and the issuance of the restitution order. That very question is addressed in §3.3 of the *Handbook* (2022), the relevant part of which section is set forth in the appendix below. The *Handbook* is available for purchase at: <https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP>.

There are consequences to the marginalization of all this critical equity doctrine by the law schools. Take the recent case of *Regan Stempniewicz Barbetti & another vs. Edward Stempniewicz*, 189 N.E.3d 264 (Mass. 2022). Applying contract law by analogy, the Supreme Judicial Court of Massachusetts, in a case involving an inter vivos trust that had been held void

ab initio, actually took issue with the trial court’s imposition of a constructive trust on the orphaned property, though the voidance itself was upheld.

Court’s rationale: “*When a trust is declared void ab initio, or void from the beginning, the courts act as though the trust never existed. See Massachusetts Mun. Wholesale Elec. Co., 411 Mass at 55 (when contract is void ab initio, ‘courts treat the contract as if it had never been made’). Assets transferred into the trust are therefore returned to the sources from which they came, as if the transfer of those assets to the trust never occurred in the first instance... Cf. Services Employees Int’l Union, Local 509 v. Department of Mental Health (476 Mass. 51, 58 (2016) (where privatization contracts were void ab initio, renewal contracts based thereon also were void ab initio)...*”

Yes, but a trust, *qua* trust, is *sui generis*, it is not a type of contract. Equity has a box of procedural tools that it has developed over time to get legal title into the hands of the victims of an unjust enrichment, or into the hands of their successors in interest. See §8.15.77 of the *Handbook* (2022). The constructive trust is an indispensable tool in that toolbox in that it facilitates the securing of the property for those victims. See generally §7.2.3.1.6 of the *Handbook* (2022). It also facilitates the orderly administration of justice in such situations. See §7.2.3.1.8 of the *Handbook* (2022). The maxim “equity looks on that as done which ought to be done” at best does not tell the whole story. “When something ought to be done but has not been done, a court of equity, so far from regarding it as having been done, proceeds to order it to be done.” 1 Scott on Trusts §131 (1939).

Appendix

§3.3 Involuntary Trustees: Constructive Trusts, Purchase Money Resulting Trusts, Trustee Succession, Deceased Trustees, Partnership Assets, Government Regulation of Property Ownership, and Other Such Matters

[from *Loring and Rounds: A Trustee’s Handbook* (2022), available for purchase at: <https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP>].

And then there is the inconvenient issue of when the constructive trust is deemed to have come into existence, at the time of unjust enrichment or at the time of the equitable decree. As the Restatement (Third) of Restitution and Unjust Enrichment takes as a given that the constructive trust is not a true trust, that it is simply a “metaphor” for a composite of two equitable remedies, one procedural and one substantive, it would prefer not to take a stand either way.²⁷ The very question is inappropriate, or ‘artificial,’ its word.²⁸ The procedural remedy is simply a judicial

²⁷Restatement (Third) of Restitution and Unjust Enrichment §55, cmt. b.

²⁸Restatement (Third) of Restitution and Unjust Enrichment §55, cmt. e.

declaration that the transferee's title to property is subject to a superior equitable claim. The substantive remedy is simply a mandatory injunction directing the transferee to surrender title to the equitable claimant. That's it. There is nothing more than that going on. But if the question must be answered, let it be answered by complementary metaphor: "...[T]he constructive trust 'exists' from the moment of the transaction on which restitution is based; or (if the court prefers) that the constructive trust arises on the date of judgment, but that the state of title it describes 'relates back' to the transaction between the parties."²⁹

²⁹Restatement (Third) of Restitution and Unjust Enrichment §55, cmt. e.