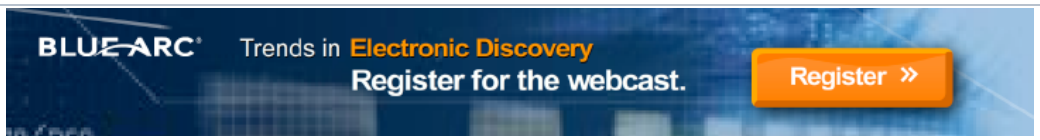

A Constructive Trust: Not an Estate Planning Tool

By Jeffrey K. Levine
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From time to time as courtesies to family, friends and clients many of us will undertake matters outside of areas we are most familiar. By that I do not suggest nor condone venturing into areas that would otherwise violate our ethical obligations under DR 7-101 to afford our clients zealous and adequate representation.

That said, the primary focus of my office is plaintiff's personal injury but recently I was confronted with a request to accept the defense of a constructive trust action. Being a plaintiff's attorney I was asked not only to switch hats and act as defense counsel but also on a matter that does not fall under the umbrella of a tort. At the same moment I was confronted with this request I just happen to receive a call from a general practice defense firm and I took the opportunity to ask my adversary what he knew about constructive trusts. He replied not being too sure about constructive trusts but could refer me to his partner who handled estate planning.

No doubt the word "trusts" triggered a knee-jerk response thinking it involved a planning issue but such a conclusion was inaccurate. After many calls made to colleagues thereafter I discovered most did not know anything about constructive trusts and the few that claimed some familiarity cited long ago law school days and nothing since. Consequently my judgment was that referring these dear friends to another lawyer would not have positioned them with better representation. And while none of us want to unnecessarily reinvent the wheel, and after much pleading by my friends to nonetheless accept their case, I did indeed take their defense under my wing.

Research revealed only a relatively small number of reported cases and those quantities increased in more recent years which arguably could be considered a trend. Notwithstanding, the history of constructive cases was long, interesting and something worth sharing.

Equitable Powers of a Court

To begin, an action that sounded in constructive trusts necessarily invoked the equitable powers of a court; thus a court of competent jurisdiction did not sit as a court of law but rather a court of equity, something a plaintiff's personal injury lawyer is rarely exposed to, if at all. By deduction we must assume, therefore, that no viable cause of action in law existed to redress a plaintiff and equitable relief was left as a last ditched effort to obtain relief. Historically the typical facts involved plaintiff's attempts to enforce oral agreements involving the transfer of real property as between relatives.

Those actions requested that equity courts create a "constructive" trust whereby the constructive trustee would be forced to hold or turn over property upon the triggering of an event. Over time, courts needed to firmly establish the criteria by which to systematically analyze, evaluate and decide constructive trust matters.

'Wood v. Rabe'

Probably the seminal case on this issue dates back to the 1884 Court of Appeals case, *Wood v. Rabe,* 96 NY 414. Weary of enforcing oral agreements the *Wood* Court stated: "The mere breach, however, of an oral agreement to convey an interest in lands is not such a fraud as will authorize the court to interfere. Where a person through the influence of a confidential or fiduciary relation acquires title to property or obtains an advantage which he cannot conscientiously retain, the court, to prevent the abuse of confidence, will grant relief. This rule is applicable to dealings between parent and child, and courts will carefully scrutinize them to protect the latter against any undue advantage being taken by the former," id at 421.

Many of you reading may ask how the statute of frauds may apply to such oral agreements, and even more so for such agreements involving property. After all, the statute of frauds was designed specifically to prevent fraud litigation arising from oral agreements. The potential for fraud in oral agreements has been kept at bay in our jurisprudence because of the statute of frauds.

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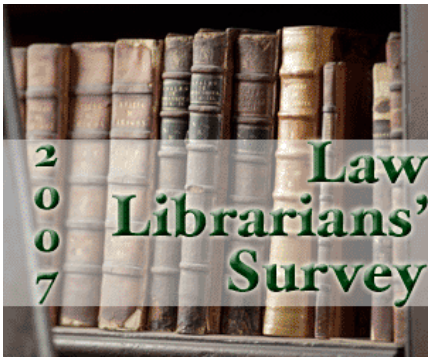

Notwithstanding, the *Wood* Court's 125-year-old undisturbed rule still stands - the statute of frauds does not apply to constructive trusts, "A court of equity will not permit the statute of frauds to be used as an instrument of fraud." id at 421. Unfortunately no court to date has created balance to that 1884 ruling as it should be evident that asking a court to create a constructive trust based upon an alleged oral agreement could itself equally be utilized as an instrument of fraud.

The broad power of an equity court can be seen in *Simonds v. Simonds,* 45 NY2d 233, where it was specifically held that flexibility was key when confronted with an action to establish a constructive trust. Quoting Judge Charles S. Desmond's 1949 opinion in *Latham v. Father,* 299 NY 22, the Court of Appeals restated the following:

> [a] constructive trust will be erected whenever necessary to satisfy the demands of justice***[Its] applicability is limited only by the inventiveness of men who find new ways to enrich themselves unjustly by grasping what should not belong to them, but compare *McGrath*, infra. Absent a preserved writing of the parties intent, such potential fraud between a covered class, likely wrought with emotion and possible ulterior motives is easily foreseeable where the previously close familial relationship turns vitriolic or worse, resulting in mistake, failed memories, deception or even perjury. Yet our courts are charged with sifting through such inner conflict and turmoil in the face of an alleged oral agreement - a clear exception to our otherwise accepted practice of law and boundaries established by the statute of frauds.

The above as backdrop, our current case law prohibits invocation of the statute of frauds and so, with potentially heated disputes between family members, lets take a broader look and evaluate the relevant criteria. Constructive trusts invoke a court's equitable powers in an effort to rectify a fraud and not enforce intent, *Sharp v. Kosmalski,* 40 NY2d 11 and *Lefton v. Bedell,* 160 AD2d 702.

Consequently, one could reasonably argue that if intentions or facts were in dispute, a plaintiff could not prima facie establish a case and be non-suited, although that seems not to be the practical application of our precedent, see *O'Brien v. Dalessandro,* 43 AD3d 1123.

Indeed in the absence of writing, courts have held that where only one party is unreasonable to the degree of creating an inequity by fraud, a constructive trust will be equitably created over the subject property to right the committed wrong. Of the reported cases, plaintiffs typically argued they were induced into not preserving their intentions because of a close or confidential relationship.

Four-Pronged Analysis

Since *Wood*, our courts fashioned a four-pronged analysis to evaluate whether or not a constructive trust should be created in order to prevent fraud due to an absence of writing which otherwise, and presumably, would have concretized mutually agreed upon terms and conditions. The four elements that should be present before a court may exercise equitable powers are:

(1) the existence of a fiduciary or confidential relationship,

(2) a promise, express or implied,

(3) a transfer in reliance on the promise, and

(4) unjust enrichment, *Coco v. Coco,* 107 AD2d 21.

Absent just one element a court is not empowered to establish the requested constructive trust. For example, the court in *Christou v. Christou,* 109 AD2d 1058, aff'd 65 NY2d 85, barred enforcement of an oral agreement to convey real property to plaintiff. The court ruled plaintiff's alternative legal and equitable theories were insufficient as exceptions to oral contracts, and thus dismissed the complaint sounding in Part Performance (GOL §5-703), violative of the Statute of Frauds and also failure to prove a constructive trust on the merits and alternatively pursuant to the six-year statute of limitations.

And all four elements must be pleaded with specificity because the commonality in any such claim is that a plaintiff asks the court to undo a "fraud" allegedly perpetrated by the constructive trustee. It is well-settled that fraud must be pleaded with specificity. And procedurally, in *Mazzone v. Mazzone,* 269 AD2d 574, the Second Department (2000) ruled that CPLR §213(1) provided for a six-year statute of limitation, see also *Taintor v. Taintor,* 2008 NY Slip Op 3446 (Second Dept. April 15, 2008).

The statute is triggered . . . upon the wrongful act giving rise to a duty of restitution and not from the time the facts constituting the fraud are discovered. id at 574, citing *Mattera v. Mattera,* 125 AD2d 555 (1986). Thus, the six-year statute runs from the time when the fraud was actually committed and not from when it was discovered.

First Prong

● ***Fiduciary or Confidential Relationship.*** To dispense with the more obvious definition, a "fiduciary" relationship would be attorney/client, doctor/patient, pastor/parishioner, etc. In *Wood*, supra, the confidential relationship was between mother and son; in *Coco,* supra, it was also a mother and son; in *Christou*, supra, the dispute was between brothers (and the wife of one brother); *Bankers v. Shakerdge*, 49 NY2d 939, dispute between widow and brother-in-law over proceeds of life insurance; *Angermiller v. Ewald*, 133 AD 691, dispute over Manhattan property between "intimate" friends; *Foreman v. Foreman,* 251 NY 237, dispute between infant and father and deceased mother's estate; *Goldsmith v. Goldsmith,*

145 NY 313, dispute over Brooklyn property among mother and siblings, and the list goes on and on.

Courts have been careful to explain that constructive trust cases are not limited to family, but most of the cases do reflect family disputes because those familial relationships rise to the level of "confidential." In *Muller v. Sobol,* 277 AD 884, the Court didn't condone but recognized the confidentiality between plaintiff and defendant who were common-law spouses in excess of 20 years, or in *Rocchio v. Biondi,* 40 AD3d 615, where the parties were engaged in a joint venture but the Complaint's allegations failed to substantiate the elements of a cognizable joint venture which might otherwise have demonstrated a confidential relationship. In *Fraw Realty v. Natanson,* 261 NY 396, the Court ruled a relationship which was newly created by the transaction involving the conveyance and the promise, would not rise to the level of something "confidential" because to so hold would open up a flood of litigation such that in every case a trust may be created by an oral declaration.

Typically, some promise was allegedly made by defendant to list the now aggrieved plaintiff on a deed or title, and based upon the confidential/fiduciary nature of the prior relationship said promise was not preserved in writing. Unlike in the case my firm defended, before making such a promise an actual interest in the property must exist and be vested in the promisor, *Kaufman v. Torkan,* 2008 NY Slip 4838 (Second Dept, May 27, 2008), *Matter of Wells,* 36 AD2d 471, affd 29 NY2d 931. For allegedly fraudulent reasons the purported oral agreement was violated and thus triggered a lawsuit asking a court to equitably fulfill the promise and place plaintiff on said deed or title. Establishing a confidential or fiduciary relationship should be rather straightforward but still needs to be well detailed in order to satisfy this first prong.

Second Prong

● ***Promise-Express or Implied.*** This prong will have a unique alleged oral promise and, again, allegedly "expressed" with specificity. Alternatively, the promise can be implied which was seen in only a minority of reported cases, *Rogers v. Rogers,* 63 NY2d 582 (second insurance policy replaced lapsed original policy that was pledged to first wife and children - second insurance policy named second wife as beneficiary instead of upholding the express promise made to first wife and children. In creating a constructive trust court held second insurance policy was implied promise to replace original policy); Judge Benjamin Cardozo stated in *Wood v. Duff-Gordon,* 222 NY 88, "Though a promise in words was lacking, the whole transaction, it might be found, was 'instinct with an obligation' imperfectly expressed," see also *Moak v. Raynor,* 28 AD3d 900, *Sharp,* supra, but compare *Scivoletti v. Marsala*, 61 NY2d 806. Obviously, absent any specifically expressed or implied promise to convey land, transfer an interest in some other property, etc., an action to create a constructive trust would lack merit.

Third Prong

● ***Transfer in Reliance on Promise.*** Absent the second prong, promise, we would not get to the next stage, reliance on said promise, to establish this third prerequisite in the building blocks of a constructive trust. If we accept that the matrix of humanity and behavior follows a thought, then speech then action construct, transfer in reliance is where action begins or for the disenfranchised plaintiff where it was supposed to begin. Here, a plaintiff necessarily must allege that money was loaned in furtherance of a promise or that he had an interest in the contested property. A practitioner must be careful to make clear that said transfer was based upon some condition precedent and was not, for example, a gift or what could be construed as a gift.

Such lack of clarity and detail non-suited the plaintiff in *Brandes v. Agnew,* 275 AD 843, 844, where the Second Department ruled

> There is no allegation in this complaint that defendant took title to this property without the consent or knowledge of the plaintiff, who paid the consideration, or that defendant purchased the property with money belonging to plaintiff in violation of some trust. (Real Property Law §94.) In the absence of such allegations, the property was, in legal effect, a gift to defendant. (*Weigert v. Schlesinger,* 150 App. Div. 765, affd. 210 N.Y. 573). A cause of action for the return of such a gift may not be maintained even if the gift was obtained fraudulently.

In *Lefton,* supra, and *Eickler v. Pecora,* 12 AD3d 635, the Second Department also held that prior to forming a constructive trust, in particular, "it must be shown that the party seeking to impose the constructive trust had some interest in the property prior to obtaining the promise that the property would be conveyed." In addition, for circumstances involving a loan for property, if an interest did not already exist in the property plaintiff must allege that as a consequence of the loan defendant promised a stake in the property, else the so called loan would be considered a gift, see *Liselli v. Liselli,* 263 AD2d 468. This third indispensable element must exist and be properly pleaded in order to avoid the interpretive pitfalls of being considered a gift or lacking in interest without which a transfer could not have legally or equitably occurred in the first instance.

Fourth Prong

● ***Unjust Enrichment.*** Regarding the final and fourth prong, unjust enrichment, the Court of Appeals reversed a finding for plaintiff when it ruled in *McGrath v. Hilding,* 41 NY2d 625, that the powers of a court of equity are not so circumscribed that the inequitable conduct of one who invokes its relief may escape its scrutiny and evaluation. The Court went on further to proclaim enrichment alone will not suffice to invoke the remedial powers of a court of equity. A critical idea is that under the circumstances and as between the two parties to the transaction the enrichment be unjust, id at 629. The defendant in *McGrath* irrefutably promised to give his soon-to-be wife half the interest in their prospective marital

dwelling wherein he had already resided. In reliance on that promise, and prior to their marriage, the fiancée invested her uncommingled money in expanding defendant's home to inter alia provide additional space for children from her first marriage. However, the plaintiff and defendant divorced within three months of marriage when it was discovered plaintiff had been cavorting with her first ex-husband and to whom she re-married a short while later, prior to any transfer of interest in the property. Plaintiff sued her second ex-husband for the half-interest promised her under the theory of constructive trust.

One issue before the Court was whether defendant had been unjustly enriched by the expansion and increased value of his home, to wit, he contributed no money yet retained an undivided interest. The Court stated that it has been assumed that Mr. Hilding was indeed enriched by virtue of the monies invested by plaintiff in reliance upon the promise to transfer by defendant. But "enrichment" alone was not enough for the Court and the reason why plaintiff's complaint was dismissed. The rule was that enrichment needed to be "unjust" meaning that defendant in good conscience could not morally retain title to the enriched property and it was a subjective morality that a Court must objectify in order to determine whether the threshold of unjustness had been breached.

The *McGrath* Court could not say the defendant/ex-husband number two, was unjustly enriched by a larger home, although greater in value, because it was not something he desired in the first instance. No doubt cavorting with the first-ex-husband sat poorly with the majority and also impacted the frame of mind and morality evaluation the court undertook.

Under the right circumstances a court of equity could have otherwise stepped in to right a wrong where no remedy existed in law. *McGrath,* however, was not such a case wherein Judge Charles D. Breitel looked at the human setting and circumstances that confronted Mr. Hilding compounded with the wife's inequitable actions and ruled in a gestalt way that the moral compass did not consider it unjust for Mr. Hilding to hold onto the undivided interest in property and instead to renege on the oral agreement.

Conclusion

Does a bright-line rule exist for those of us lucky enough to be confronted with a client who either wants to pursue or needs to defend an equitable claim of constructive trust? Certainly our precedent established a four-pronged analysis but things are not often so neat and tidy as a checklist. A court of equity can be unpredictable to a lawyer accustomed to a more formal legal analysis. Like in *McGrath* and with the statute of frauds not applicable, credibility and morality will be the guiding light in determining whether an oral contract as between confidants is enforceable. No doubt as this potential trend continues to grow we will see yet more examples of the human condition in all of its glory as well as courts that will be asked to sit in equitable judgment.

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