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Equitable Remedies

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Chapter 51

EQUITABLE REMEDIES

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§ 51.1 • INTRODUCTION

In addition to the statutory and legal remedies discussed elsewhere in this *Handbook*, there are several equitable remedies available to claimants in trust and estate litigation. These equitable remedies can serve as particularly useful tools, especially in situations in which the statutory and/or legal remedies are inadequate or unavailable. The sections that follow discuss some of the more common equitable remedies available in the trust and estate context.

§ 51.2 • ACCOUNTING

Fiduciaries, including personal representatives,¹ trustees,² agents,³ and conservators,⁴ are all subject to a duty to account. The right to receive an accounting is crucial in terms of the ability to seek relief against a fiduciary for misconduct. Without an accounting of a fiduciary's actions, it can be difficult, if not entirely impossible, to determine the nature and extent of any possible wrongdoing.

While the failure to account can be cited as a breach of fiduciary duty, a request for an accounting can also be a form of relief sought from a court. In some situations, the party requesting the accounting is only seeking to obtain more information. Such might be the case if the party does not have a clear right to the information contained in the accounting, and court action is necessary to establish that right. This situation might also arise in cases where a party who does have a clear right to the information believes that complete information has not been provided.

In other cases, a party may seek to obtain an accounting because of concerns over fiduciary misconduct. In this regard, a request to the court that the fiduciary produce an accounting may precede or be included as part of an action against the fiduciary for misconduct. In this situation, the accounting can serve as the basis for seeking other remedies.

§ 51.3 • RESULTING TRUSTS

§ 51.3.1—Generally

A resulting trust is an equitable remedy implied by law. It is used for the purpose of carrying out the intent of a party who has transferred property to another without the intent to convey a beneficial interest in the property to the transferee.⁵ A resulting trust is most appropriate in situations where the transferor transfers title to a transferee with the intent that the transferee hold legal title to the property for the benefit of another, but for some reason the intent of the transferor cannot be fully implemented. In such a case, presumably the transferor did not intend for the transferee to retain the beneficial interest. This situation occurs most frequently when a transferor and transferee orally agree to a trust or other type of arrangement, such as a nominee arrangement, but the instrument conveying the property transfers the property outright to the transferee. Because of the statute of frauds, the oral trust arrangement is unenforceable. A resulting trust is imposed to prevent the transferee from taking title to the property free and clear of any trust arrangement. Note that Colorado does allow oral trust arrangements in certain circumstances, but any arrangement involving real property must be in writing under the statute of frauds. If the oral trust arrangement is enforceable, no resulting trust would be imposed because the agreement can be enforced according to its terms.

When a resulting trust arises, title reverts to the transferor or the transferor's successors.⁶ If a resulting trust is imposed on property, the legal title holder is subject to a duty to convey the property back to the transferor.

The *Restatement (Second) of Trusts* explains that:

A resulting trust arises where a person makes or causes to be made a disposition of property under circumstances which raise an inference that he does not intend that the person taking or holding the property should have the beneficial interest therein, unless the inference is rebutted or the beneficial interest is otherwise effectively disposed of.⁷

The *Restatement (Third) of Trusts* makes no reference to intent, describing a resulting trust as “a reversionary, equitable interest implied by law in property that is held by a transferee, in whole or in part, as trustee for the transferor or the transferor’s successors in interest.”⁸ Although these definitions are not necessarily contradictory, Colorado courts have relied on the definition contained in the *Restatement (Second) of Trusts*.⁹

Commentators and case law have identified three main situations in which a resulting trust may be imposed, each of which will be discussed in more detail in the sections that follow. The first situation in which resulting trusts are utilized is when a party intends to create an express trust, but the express trust fails, either in whole or in part.¹⁰ The second situation arises when the terms of an express trust have been performed in their entirety, but there are still trust assets remaining.¹¹ In the final situation, one party pays the purchase price for property, but a different party takes title.¹² The key component in each of these situations is that the party transferring the property did not intend that the party taking title would also receive the beneficial interest.¹³

One important point to note about a resulting trust is that it is a remedy, not a separate cause of action.¹⁴ If pled as a separate cause of action, the claim can be dismissed or denied.¹⁵ Nevertheless, it is not uncommon to see pleadings accepted by the courts that appear to treat a resulting trust as a cause of action itself. In practice, it can be challenging to fashion a cause of action that justifies the imposition of a resulting trust and also fits the particular circumstances of the case. However, because of the risk that the claim could be dismissed, it is generally best to avoid framing a resulting trust claim as a separate cause of action.

§ 51.3.2—Distinguished From Constructive Trusts

Resulting trusts, along with constructive trusts, are often referred to by commentators as “implied trusts.”¹⁶ Contrary to what their name suggests, they are not, in fact, trusts at all, but rather are equitable remedies imposed by courts under certain circumstances. Courts and commentators often have lacked precision in defining these concepts and in distinguishing them from one another. Traditionally, resulting trusts have been described as a remedy to enforce intent, while constructive trusts are used for the purpose of rectifying fraud.¹⁷

In part due to the lack of precision in the terminology and definitions, resulting trusts, and constructive trusts in particular, are flexible remedies.¹⁸ Their nature as equitable remedies allows courts to fashion appropriate relief in unique situations. Because of the lack of clarity in this area, it is generally best to request the imposition of both a resulting and constructive trust, even if the facts seem to fit one remedy better than the other. Obtaining an order imposing both a resulting and constructive trust also reduces the likelihood that the outcome will be entirely reversed on appeal.¹⁹

§ 51.3.3—When Imposed

Failure of Express Trusts

Resulting trusts may be imposed when a party transfers title to property intending to create a trust or other similar type of arrangement, but for some reason the trust or other arrangement fails.²⁰ In most situations, the resulting trust arises in favor of the transferor, the transferor's successors, or the transferor's estate.²¹ Trusts can fail for a number of reasons, but not all of these reasons give rise to a resulting trust.

Resulting trusts often arise when there are issues surrounding the selection of a beneficiary. Specifically, a failure by the transferor to name a beneficiary, to name a beneficiary in existence, to name an ascertainable and definite beneficiary, or to name a beneficiary properly can all result in the imposition of a resulting trust.²² Some examples include naming a beneficiary who is deceased at the time of the transfer, or transferring property in trust for persons to be named later when no such persons are named. With respect to unascertainable beneficiaries, a resulting trust may arise in favor of the transferor or his successors if the transfer was a testamentary transfer in trust for an indefinite class of beneficiaries and the beneficiaries are so indefinite that it is unclear who qualifies. Under the *Restatement (Second) of Trusts*, however, a transfer for the benefit of an indefinite class does not necessarily give rise to a resulting trust. If the transferee is authorized to distribute among the class members as the transferee chooses, no resulting trust arises if the transferee elects to make such distributions.²³ The *Restatement* gives the example of a devisee directed to distribute property among the testator's friends. Because "friends" is an indefinite class, the attempted trust fails. However, if the individual chooses to distribute the property among the testator's friends, then no resulting trust is necessary.²⁴

An express trust may fail, and a resulting trust may arise, when the purpose of the trust is so indefinite that it cannot be determined whether there is any application of the purpose. An example of such an indefinite purpose is an instruction specifying that certain property be disposed of for any beneficial purpose for which the person charged with making the distribution sees fit. For this situation to arise, there must be no named ascertainable beneficiary capable of taking the property. Also, if the purpose is limited to a charitable purpose, the trust may still be enforced under the doctrine of *cy pres*, and a resulting trust therefore does not necessarily arise.²⁵ However, if the purpose is not limited to an exclusively charitable purpose, a resulting trust may be imposed. As with indefinite beneficiaries, the *Restatement (Second) of Trusts* states that no resulting trust arises if the transferee of the property chooses to distribute the property in accordance with the indefinite purpose. Also note that capricious purposes will not be enforced, and a resulting trust may be imposed.²⁶

Under the *Restatement (Second) of Trusts*, lifetime property transfers in trust for the benefit of an indefinite class are treated differently from testamentary transfers. The transferee retains the authority to transfer the property to members of the indefinite class until the authority to do so is revoked. During the transferor's lifetime, the ability to control the beneficial interest in property transferred to a transferee to hold for the benefit of an indefinite class remains with the transferor. Therefore, the transferor may revoke the authority and regain possession at any time. Upon the death or incapacity of the transferor, or the failure of the trust's purpose, a resulting trust arises on the remaining property in favor of the transferor or the transferor's estate. This situation differs from a testamentary transfer because the living transferor retains control of the beneficial interest and ability to revoke the authority, so no need to impose a resulting trust arises until the transferor is no longer able to revoke the transfer.²⁷

Express trusts may also fail due to an illegal purpose. Under both the *Restatement (Second)* and *Restatement (Third) of Trusts*, the trustee retains the property free of trust if the policy of preventing unjust enrichment is outweighed by the policy against providing relief to the settlor despite the wrongdoing.²⁸ However, a resulting trust is imposed if the trustee was more at fault than the settlor, if the settlor demands that the property be returned before the illegal purpose is carried out, if the settlor was unaware of the facts making the purpose illegal, or if the trust with the illegal purpose was a testamentary trust.²⁹

It is important to note that an express trust may fail only in part. In such a case, it is possible that a resulting trust be imposed on only that portion of the trust that fails. Also note that resulting trusts may be imposed when an express trust fails at its outset or when an express trust subsequently fails. An example of a failure at the outset would be a transfer in trust for the benefit of a deceased person. A subsequent failure would occur if S transferred property in trust to T with income going to B for B's lifetime and the remainder on B's death to go to B's children, but B dies without leaving any children. In this case, a resulting trust would be imposed in favor of S on the remainder.³⁰

Trust Corpus Not Fully Exhausted

In some cases, a trust is fully performed, but the trust corpus is not fully exhausted. For example, A transfers \$100,000 to B in trust for the purpose of providing for the education of C, but C's education costs only \$60,000. In that situation, a resulting trust is imposed on the remaining trust assets in favor of the settlor.³¹ In the example, a resulting trust would be imposed on the \$40,000 remaining after C's education is complete. However, no resulting trust arises if the settlor properly manifested an intention that no resulting trust should arise. This intention could be manifested by a provision regarding the disposition of the remainder, an acceleration of future interests, or a provision that the trustee retains any remaining trust property.³² As is the case when an express trust fails, the doctrine of *cy pres* may be applied in the case of a surplus of trust assets after a charitable trust has been fully performed. If *cy pres* is applied, no resulting trust arises.³³

Purchase Money Resulting Trusts

The purchase money resulting trust (PMRT) is a special application of the resulting trust concept. PMRTs arise in favor of a purchaser when the purchase price for property is paid by one party, but title to the property is taken by another.³⁴ Some commentators have urged that the PMRT is not a resulting trust at all, but rather an express trust.³⁵ However, because PMRTs are often treated as a type of resulting trust, they will be discussed in this section.

If the person paying the purchase price manifests an intention that no resulting trust should arise, no PMRT will be found. This manifestation would occur if the purchaser expresses an intent that the recipient also receive the beneficial interest, or the purchaser intends to make a gift of the property. Similarly, if there is an intent that a loan be made to the transferee, or the property is purchased to discharge a debt owed to the transferee, no PMRT arises.³⁶

A presumption exists that no PMRT arises if a relative of the purchaser takes title to the property.³⁷ Whether this presumption applies to a particular relative does not depend on the closeness of the familial relation, but rather whether the relationship between the purchaser and transferee suggests that the purchaser intended to make a gift of the property to the transferee.³⁸ This presumption can be overcome if the transferor manifested an intention that the transferee not receive the beneficial interest in

the property.³⁹ The purchaser's intent at the time of the transfer determines whether a PMRT should arise, and parol evidence regarding intent is admissible.⁴⁰

A PMRT also does not arise if the purpose of the arrangement was illegal. An example of such an illegal purpose would be defrauding the purchaser's creditors. In such a case, the transferee would retain the property, but the purchaser's creditors would have a claim against it.⁴¹ According to the *Restatement (Second)* and *Restatement (Third) of Trusts*, a resulting trust can arise if the policy of preventing unjust enrichment of the transferee outweighs the policy of providing relief to the transferor who entered an illegal transaction.⁴²

Potential Additional Applications of the Resulting Trust Concept

The examples set forth in the preceding sections involve the more traditional applications of resulting trusts. With the imprecision surrounding the resulting trust and constructive trust concepts, it is possible that courts may be receptive to additional applications. As discussed elsewhere in this chapter, request the imposition of both a resulting and constructive trust whenever possible.

Particularly in recent years, individuals have relied on informal estate planning techniques in an effort to avoid probate. Such efforts include adding children as joint owners of property or transferring property outright to intended beneficiaries during the individual's lifetime. Occasionally, these transfers do not include all the intended recipients of the property. The omission may have been inadvertent, or in some situations the transferor intended that the transferee(s) would share the property with all intended recipients. A similar situation occurs with "convenience accounts," where an elderly or disabled individual adds a joint owner on a bank account to assist with the payment of expenses. When the elderly or disabled person passes away, the surviving joint owner takes title to the entire account by operation of law. In many situations, the elderly or disabled person did not intend this result. In these types of situations, an equitable remedy may be the only recourse for intended recipients. Although these examples do not precisely fit the more traditional applications of the resulting trust concept, consider seeking the imposition of both a resulting and constructive trust in favor of omitted recipients.

§ 51.4 • CONSTRUCTIVE TRUSTS

§ 51.4.1—Generally

Broadly, the constructive trust is an equitable remedy imposed for the purpose of placing title to property in the hands of the party to whom it rightly belongs. If a party holds title to property and it would be inequitable for that party to continue holding title to the property, a constructive trust may be imposed in favor of the rightful owner.⁴³ Constructive trusts are often described as a remedy to prevent unjust enrichment,⁴⁴ and they have been even more broadly defined as being "the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee."⁴⁵ The constructive trust doctrine is routinely regarded as an extremely flexible remedy.⁴⁶

As with resulting trusts, a constructive trust is a remedy and not a cause of action.⁴⁷ Nevertheless, many practitioners fashion pleadings that appear to include a claim for the imposition of a constructive trust as a separate cause of action. Practitioners should be cautious in using this approach, as courts have been willing to dismiss these claims if they are not properly asserted.⁴⁸

Constructive trusts are often imposed directly on the property at issue. However, if the property has been transferred to a third party, a constructive trust directly on the property may not be appropriate. The general rule is that a constructive trust on the property is inappropriate if the property has been sold to a bona fide purchaser for value. The rationale for this rule is that the purchaser paid fair consideration for the property without notice, and therefore the continued retention of the property by the bona fide purchaser is not inequitable. However, if fair consideration was not paid, or if the purchaser took title with notice, a constructive trust on the property may still be appropriate. In situations where the property has been transferred to a bona fide purchaser for value or the property is otherwise no longer available, a constructive trust may be imposed in favor of the party who rightfully should have title to the property on the proceeds of the transfer or on property purchased with the proceeds of the transfer.⁴⁹

When a constructive trust is imposed, the party holding title to the property is converted into a constructive trustee, who then must deliver title to the party in whose favor the constructive trust arose. The constructive trustee does not necessarily have fiduciary duties with respect to the property at issue, but the existence of a fiduciary relationship may be a basis for the imposition of a constructive trust.⁵⁰

§ 51.4.2—Requirements For Imposition Of Constructive Trust

Precisely defining the necessary elements required for the imposition of a constructive trust is particularly challenging. The courts have lacked clarity in this regard, and it is not always clear what a party seeking to impose a constructive trust must show. The *Restatement (Third) of Restitution and Unjust Enrichment* describes an appropriate case for the imposition of a constructive trust as a situation in which (1) the defending party has been unjustly enriched; (2) by obtaining legal title to property; (3) either at the expense of the claiming party or in violation of the claiming party's rights.⁵¹

As to the first element listed in the *Restatement*, it is relatively clear that a primary purpose for the constructive trust doctrine is the prevention of unjust enrichment. Colorado courts have acknowledged this purpose by describing the doctrine as “an equitable remedy devised to prevent unjust enrichment and compel restitution of property that in equity and good conscience does not belong to the Defendant.”⁵² Although a discussion of what constitutes unjust enrichment is beyond the scope of this chapter,⁵³ it is worth noting that many of the cases in which constructive trusts are imposed assume unjust enrichment exists and focus on the element concerning whether title was obtained at the expense of the claiming party or in violation of the claiming party's rights. It is not clear that unjust enrichment itself is a separate element that must be shown, and Colorado courts have not treated it as such. However, it is also not clear whether a constructive trust would be an appropriate remedy if unjust enrichment was not present. As a practical matter, it very well may be that the very act of obtaining title at the expense of the claiming party or in violation of his or her rights results in the unjust enrichment of the defending party.

Regarding the *Restatement's* second element, it is also relatively clear that the defending party must possess, or at some point must have possessed, legal title to the property at issue. As noted previ-

ously, constructive trusts can be imposed directly on the property at issue, or on the proceeds from the sale of the property, if the property has been transferred to a bona fide purchaser for value. Thus, it is not necessary that the defending party currently possess legal title to the property.

The third element in the *Restatement's* description proves most challenging. Colorado courts have been particularly unclear regarding whether and to what extent a claimant must show that the defending party committed a wrong. The cases have varied considerably in this regard. While some courts have required a relatively high degree of wrongdoing, some courts have noted that wrongdoing can be found simply by the transferee's continued retention of property that in equity should not belong to the transferee. Despite this uncertainty, there are several grounds that Colorado courts have consistently held support the imposition of a constructive trust, some of which will be discussed in the following section.

Before moving to a discussion of grounds for imposing a constructive trust, it is important to note one additional overarching issue on which Colorado case law is inconsistent — whether the claimant must prove fraud as a prerequisite to the imposition of a constructive trust. As discussed in the following section, a showing of fraud supports the imposition of a constructive trust. However, it is unclear whether fraud is necessary in all cases. At least some Colorado cases suggest that fraud is a prerequisite for the imposition of a constructive trust.⁵⁴ However, several other cases have suggested that fraud is not necessary. Some Colorado courts have gone so far as to specifically state that fraud is not a required element for the imposition of a constructive trust, at least under the facts presented.⁵⁵ Other cases have implied that fraud is unnecessary by stating that most constructive trusts require “fraud (active or constructive) or duress, or abuse of confidence by commission of a wrong, or some other form of unconscionable conduct or questionable means by which the trustee gains his title.”⁵⁶ This description suggests that mere “questionable” conduct justifies the imposition of a constructive trust. Other cases assume fraud is unnecessary by explaining that a constructive trust may be imposed when, in equity, the titleholder to property should not be permitted to retain it, even when title was not obtained through fraud.⁵⁷

Although it appears that Colorado courts will impose constructive trusts without the presence of fraud, it is not entirely clear that a court would do so in every situation. Some courts have suggested that at least some degree of wrongdoing is required before a constructive trust will be imposed.⁵⁸ Without a clearly defined doctrine, the courts have a considerable degree of discretion in determining whether to impose a constructive trust. As a practical matter, it is best to show fraud if possible, or at the very least demonstrate some degree of wrongdoing. Because of the lack of precision in this area and the uncertainty surrounding the requirements for imposition of a constructive trust, it is also best to include alternative theories whenever possible.

§ 51.4.3—Possible Grounds Supporting Imposition Of Constructive Trust

In recent years, courts have grown increasingly receptive to the constructive trust doctrine. Despite the uncertainty surrounding the required elements, Colorado courts in particular have been willing to impose constructive trusts in a variety of situations. With the increased usage of powers of attorney and the growing frequency of nonprobate transfers, the universe of potential scenarios that could justify the imposition of a constructive trust continues to expand. The sections that follow discuss some of the more common situations in which constructive trusts are sought. Keep in mind that the doctrine is flexible, and the potential uses of constructive trusts are many. It remains to be seen ex-

actly how far Colorado courts are willing to take the concept, and whether a more precise delineation of the doctrine by courts in the future will impose some limiting principles.

Fraud

Fraudulent conduct in connection with a transfer can give rise to the imposition of a constructive trust. Fraud can take various forms in the context of constructive trusts. One example is a fraudulent misrepresentation made for the purpose of procuring a property transfer. If a transferee knowingly made a false statement of material fact that induced a transferor to transfer property, a constructive trust may be imposed.⁵⁹ Generally, the transferor must have relied on the false statement in order to warrant the imposition of a constructive trust.⁶⁰ Similarly, fraudulently concealing a material fact with an intent to deceive may also give rise to a constructive trust.⁶¹ Constructive trusts may also be imposed based on the commission of certain crimes that involve fraudulent conduct.⁶²

In some cases, fraud is not the procuring cause of the transfer, but rather the motivating factor. Such would be the case when a transferor transfers property to another for purposes of defeating the rights of a creditor. In this case, the creditor may have grounds for seeking a constructive trust on the transferred property, so long as the transferee is not a bona fide purchaser for value.⁶³ However, equity may not permit the transferor to impose a constructive trust on the property due to his or her own involvement in the wrongdoing.⁶⁴

Abuse of Confidential Relationship

To obtain an order imposing a constructive trust based on an abuse of a confidential relationship, it is first necessary to establish that a confidential relationship exists. A confidential relationship exists “between two persons when it is established that one occupies a superior position over the other — intellectually, physically, governmentally or morally — with the opportunity to use that superiority to the other’s disadvantage.”⁶⁵ These relationships can arise from a variety of circumstances. The key requirement is that the party transferring the property maintain a justified belief that the transferee of the property will act in the best interests of the transferor.⁶⁶ In *Mancuso v. United Bank of Pueblo*, the court determined that a party claiming a confidential relationship must demonstrate that (1) the party against whom a confidential relationship is asserted was in a position of superiority that was used to the disadvantage of the claiming party and (2) the transferor reasonably believed that the transferee would act in the transferor’s best interests.⁶⁷ The party claiming a confidential relationship bears the burden of proving its existence.⁶⁸

It is not entirely clear whether a specific relationship must be shown before a confidential relationship can be established. Some courts have interpreted the reasonable belief element to include a requirement that the asserting party demonstrate that the type of relationship was such that it would cause someone “to relax the care and vigilance” ordinarily used when dealing with strangers.⁶⁹ In turn, this requirement has been interpreted to mean that the asserting party must establish the existence of “a business, agency, professional, familial, or other relationship.”⁷⁰ However, several other cases rely on more general language, suggesting that no particular relationship need be shown.⁷¹ Note that confidential relationship is not synonymous with fiduciary relationship, meaning that the existence of a fiduciary relationship is not a prerequisite to the imposition of a constructive trust.⁷² On the other hand, demonstrating that a familial or fiduciary relationship existed can help establish the existence of a confidential relationship.

In addition to establishing a confidential relationship, one must also demonstrate that the defending party took improper advantage of the relationship.⁷³ This improper advantage can be shown in different ways, but there must be some sort of “abuse” present. In some cases, this is shown by fraud, undue influence, or some other wrongdoing in connection with the initial transfer. However, it is not necessary that the transfer of property itself be a product of the abuse of the relationship.⁷⁴ A failure to honor a promise or to carry out the terms of an agreement subsequent to the transfer can also serve as grounds for an abuse of confidential relationship claim.⁷⁵

Undue Influence

Requests for the imposition of constructive trusts based on undue influence appear to have been on the rise in recent years, particularly with respect to *inter vivos* and nonprobate transfers. Perhaps because these claims are more common, the case law is more developed. In asserting that a transfer was procured by undue influence, establishing the existence of a fiduciary or confidential relationship creates a presumption of undue influence. This presumption shifts the burden of going forward with the evidence to the defending party, who then must rebut the presumption.⁷⁶ Undue influence exists in situations involving “a forceful assumption of a dominant influence of the grantor.”⁷⁷ Further, the undue influence must “overcome the will of the grantor to the extent that he is prevented from voluntary action and is deprived of free agency.”⁷⁸

Breach of Fiduciary Duty

A discussion of fiduciary duties is beyond the scope of this chapter, as other chapters deal extensively with this topic. However, in certain circumstances, a constructive trust may be an appropriate remedy for a breach of fiduciary duty. Initially, an abuse of a fiduciary relationship, like an abuse of a confidential relationship, can justify the imposition of a constructive trust. A fiduciary relationship is generally considered a type of confidential relationship that, when abused, may warrant a constructive trust. The fiduciary can abuse the relationship by breaching his or her duties. A constructive trust may also be appropriate when a fiduciary profits from a breach of fiduciary duty. For instance, a fiduciary may sell property that he or she holds in a fiduciary capacity and pocket the proceeds. Similarly, a fiduciary could usurp an opportunity or improperly use information learned in his or her fiduciary capacity to make a profit. A fiduciary who profits from a breach of fiduciary duty may be subject to a constructive trust on any proceeds or improperly obtained gains.⁷⁹

An issue that may arise in the context of a constructive trust claim involving a breach of fiduciary duty is whether a prevailing plaintiff is entitled to recover attorney fees. The American rule states that parties are generally required to pay their own legal expenses unless a statute, court rule, or contractual provision provides otherwise.⁸⁰ In *Heller v. First National Bank of Denver, N.A.*,⁸¹ Colorado recognized an exception to the American rule in the context of a breach of trust claim. If a claim for breach of fiduciary duty is sufficiently analogous to a breach of trust action, a prevailing party may be entitled to recover attorney fees.⁸²

Generally, a breach of fiduciary duty may not be sufficiently analogous to a breach of trust unless the breach of fiduciary duty involves the management of assets.⁸³ In cases not involving management or control of funds by a fiduciary, pleading a breach of fiduciary duty based on the existence of a resulting or constructive trust may be useful in obtaining recovery of attorney fees.

Unjust Enrichment

It is not clear that the presence of unjust enrichment alone is sufficient to justify the imposition of a constructive trust. As discussed previously, the constructive trust doctrine is designed to prevent unjust enrichment. However, the cases noting that fraud or at least some degree of wrongful conduct is required for a constructive trust suggest that mere unjust enrichment may be insufficient. Accordingly, with cases involving nothing more than unjust enrichment, it is particularly important to consider seeking both a constructive and resulting trust in situations where the facts warrant both causes of action.

With the increased use of informal estate planning techniques, situations involving unjust enrichment without wrongful conduct are on the rise. Take, for example, the practice of convenience accounts, which are often used by the elderly. With convenience accounts, elderly persons add their children or other trusted individuals as joint owners on their bank accounts. The purpose of this arrangement is to facilitate the payment of the elderly person's expenses by the child or trusted individual. Problems arise when the elderly person dies. Because the child or trusted individual was a joint owner on the account, that person takes title to the entire account on the death of the other joint tenant. In many cases, the elderly person did not intend this result. Often, the surviving joint owner agrees to treat the account as a probate asset or to share it with other family members, particularly in close family situations. However, conflict in this area has become increasingly common in recent years.⁸⁴

If the surviving joint owner refuses to share the proceeds of the account, the intended recipients may seek to impose a constructive trust.⁸⁵ Imposing a constructive trust might be questioned, however, because generally no fraud or wrongdoing is present in connection with the establishment of convenience accounts. In most situations, the elderly person fully intended to add the joint owner, but did not intend for the account to pass in its entirety to the joint owner at the elderly person's death. At least in the context of a confidential relationship, it may not be necessary to prove fraud or wrongdoing in connection with the establishment of the convenience account.⁸⁶ The failure to honor the intent of the person establishing the account may be sufficient to justify the imposition of a constructive trust.⁸⁷ Generally speaking, a confidential relationship is likely to exist in the context of convenience accounts.

Because there generally is no wrongful conduct in connection with the establishment of convenience accounts, another possibility would be to seek the imposition of a resulting trust. As discussed in § 51.3.1, resulting trusts are utilized as an intent-rectifying remedy. A resulting trust may be a more appropriate remedy in situations where the primary objective is to enforce intent. In appropriate factual circumstances, both remedies should be pursued.

In addition to convenience accounts, constructive and/or resulting trusts may be used to correct situations in which a decedent fails to update his or her beneficiary designations before death, resulting in account proceeds or other benefits being payable to an individual or entity other than that which the decedent likely intended. This situation most commonly occurs when a divorced spouse fails to remove his or her ex-spouse from a beneficiary designation following divorce. In Colorado, a beneficiary designation executed before divorce is automatically revoked upon dissolution of marriage.⁸⁸ However, the revocation on divorce statute is inapplicable if the beneficiary designation was associated with an account or retirement plan that is governed by the Employee Retirement Income Security Act of 1974 (ERISA).⁸⁹ If ERISA governed the plan, the proceeds are still payable to an ex-spouse named in a beneficiary designation. In recent years, it has been suggested that a constructive trust may be imposed on the proceeds once they have been distributed to the ex-spouse.⁹⁰ Such an approach has been recognized

in the context of persons seeking to impose a constructive trust on U.S. bond proceeds passing to a joint tenant when there is fraudulent or inequitable conduct.⁹¹

As with convenience accounts, imposing a constructive trust on account proceeds or retirement benefits generally involves relying upon unjust enrichment principles. Although some states' courts have been willing to impose constructive trusts on this basis, it is still untested whether Colorado courts would be willing to do the same.

Other Grounds

The general principles discussed in this chapter are not intended to be exhaustive. Imposition of constructive trusts has been asserted as a remedy in countless contexts — including for failure to lodge a will, negligent misrepresentation, tortious interference with inheritance rights, abuse of process, tortious misfeasance, and conspiracy. As noted elsewhere in this chapter, the remedy is intended to be flexible, although it is still uncertain how far Colorado courts are willing to take the concept. When faced with a situation in which a constructive trust might be appropriate, the best place to begin is locating a case imposing a constructive trust on similar facts. If one cannot be located, which is not unusual, one can fall back on general principles. The strongest cases will involve fraud or other questionable conduct, but a court may still impose a constructive trust absent wrongdoing. With all of the uncertainty in the doctrine, seek alternative remedies whenever possible, and always advise clients of these issues before moving forward.

§ 51.5 • OTHER EQUITABLE REMEDIES

§ 51.5.1—Equitable Lien

The equitable lien is closely tied to the constructive trust. It is defined as a right to have a claim satisfied from specific property without having possession of that property,⁹² and it arises in situations in which a constructive trust is not appropriate.⁹³ It can be asserted when a fiduciary improperly uses property held in a fiduciary capacity to improve the fiduciary's rightfully owned property,⁹⁴ or when a joint owner makes improvements to jointly owned property that increase the property's value.⁹⁵

§ 51.5.2—Subrogation

Subrogation is when one party substitutes for another in the payment of a debt. It entitles the party paying the debt to the rights, remedies, and securities to which the debtor would otherwise be entitled.⁹⁶ It arises in equity to prevent fraud or injustice, such as when a fiduciary uses property held in a fiduciary capacity to release a mortgage on the fiduciary's own property.⁹⁷

§ 51.5.3—Restitution

Restitution is the means by which a wronged party is restored to his or her prior position, either by return of property or the equivalent in money. It is utilized for the purpose of preventing unjust enrichment. A constructive trust is a form of restitution imposed for the purpose of returning property to the rightful owner.⁹⁸

§ 51.5.4—Specific Performance

Specific performance is the court-imposed enforcement of a promise, as close as practicable to the original terms. It lies within a court's discretion to order specific performance in situations in which the legal remedy would be inadequate or damages could not be determined.⁹⁹

§ 51.6 • FINAL CONSIDERATIONS

Equitable remedies by their very nature tend to be more flexible than remedies at law, and they can provide remedies where statutory rules and legal remedies are inadequate. They are particularly useful in the probate context, where emotions run high and being “made whole” often means recovering specific items of property. However, equitable remedies often involve less certainty, which can be troubling from a litigant's perspective. It can also be far more difficult from the attorney's point of view to adequately explain the relevant concepts to clients.

It is also important to note that, whenever equitable remedies are sought, the defending party may assert equitable defenses. Equitable defenses are mentioned here solely for the purpose of reminding the reader of this possibility. Some of the more common equitable defenses include laches, unclean hands, estoppel, waiver, mistake, fraud, and illegality.

Finally, claimants who bring suits in equity are not entitled to a jury trial. Before filing suit, consider carefully whether a jury trial or a trial to the court would better serve the client's interests. If the equitable claims are strongest but a jury trial is desirable, consider also asserting legal claims for damages along with a request for an advisory jury as to the equitable issues.

NOTES

1. James R. Wade, *Colorado Law of Wills, Trusts & Fiduciary Administration* § 20.6 (5th ed. 2011).
2. C.R.S. § 15-16-303(4).
3. C.R.S. § 15-14-714(1)(d).
4. C.R.S. § 15-14-420.
5. *Bryant v. Cmty. Choice Credit Union*, 160 P.3d 266, 271 (Colo. App. 2007).
6. See Charles E. Rounds, Jr. & Charles E. Rounds, III, *Loring and Rounds: A Trustee's Handbook* § 4.1.1.1 (8th ed. 2013) [hereinafter *Loring & Rounds*].
7. *Restatement (Second) of Trusts* § 404 (1959).
8. *Restatement (Third) of Trusts* § 7 (2003).
9. *Mancuso v. United Bank of Pueblo*, 818 P.2d 732, 739 (Colo. 1991).
10. *Page v. Clark*, 592 P.2d 792, 797 (Colo. 1979) (quoting *Scott on Trusts* § 404.1 (3d ed. 1967)).
11. *Id.*
12. *Id.*
13. *Id.*
14. *Bryant*, 160 P.3d at 276.
15. *Id.*
16. See, e.g., G.G. Bogert & G.T. Bogert, *The Law of Trusts and Trustees* (2d ed., Revised, 1984) § 541 [hereinafter *Trusts and Trustees*].
17. *In re Marriage of Heinzman*, 596 P.2d 61, 63 (Colo. 1979); see also George P. Costigan, Jr., “The Classification of Trusts as Express, Resulting, and Constructive,” 27 *Harv. L. Rev.* 437 (1914).

18. *Mancuso*, 818 P.2d at 737; *Page*, 592 P.2d at 799.
19. *See Page*, 592 P.2d 792.
20. *Id.* at 738-39; *Restatement (Second) of Trusts* § 411.
21. *See Restatement (Second) of Trusts* § 411.
22. A. W. Scott, W. F. Fratcher, & M. L. Ascher, *Scott and Ascher on Trusts* 41.1.1 (5th ed. 2006) [hereinafter *Scott & Ascher*].
23. *Restatement (Second) of Trusts* § 416.
24. *Id.* at § 416 illustration 1.
25. *Id.* at § 413.
26. *Id.* at § 417-18.
27. *Id.* at § 419.
28. *Id.* at § 422; *Restatement (Third) of Trusts* § 8.
29. *Scott & Ascher*, *supra* n. 22, at § 41.12.6.
30. *Restatement (Second) of Trusts* § 411 cmt. k.
31. *Restatement (Second) of Trusts* § 430.
32. *Id.* at § 431.
33. *Id.* at § 432.
34. *Id.* at § 440.
35. *See, e.g., Loring & Rounds*, *supra* n. 6, at § 4.1.1.1. With the failure of an express trust or excess trust corpus, the transferor has a vested reversionary interest in the remaining trust property. *With a PMRT, however, a resulting trust does not arise automatically* by operation of law, as it depends on the intent of the person paying the purchase price. *Id.*
36. *Restatement (Second) of Trusts* § 441.
37. *Id.* at § 442.
38. *Id.* at § 442 cmt. a.
39. *Id.* at § 443.
40. *Id.* at § 443 cmt. a.
41. *Scott & Ascher*, *supra* n. 22, at § 43.5.
42. *Restatement (Second) of Trusts* § 444; *Restatement (Third) of Trusts* § 9.
43. *See Page*, 592 P.2d at 797-98.
44. *Mancuso*, 818 P.2d at 737.
45. *Beatty v. Guggenheim Exp. Co.*, 122 N.E. 378, 380 (N.Y. 1919).
46. *Mancuso*, 818 P.2d at 737.
47. *Bryant*, 160 P.3d at 276.
48. *See, e.g., id.*
49. *See Loring & Rounds*, *supra* n. 6, at § 7.2.3.1.6. *See also In re Marriage of Allen*, 724 P.2d 651, 657 (Colo. 1986).
50. *Trusts and Trustees*, *supra* n. 16, at § 471.
51. *Restatement (Third) of Restitution and Unjust Enrichment* § 55 cmt. a.
52. *In re Specialized Installers*, 12 B.R. 546, 553 (Bankr. D. Colo. 1981). Different courts have expressed this concept in various ways, but the idea is the same.
53. For a general discussion of what constitutes unjust enrichment, *see Restatement (Third) of Restitution and Unjust Enrichment* § 1 cmt. b.
54. *See, e.g., AEC Indus., LLC v. Survivor Oil, Inc.*, 7 P.3d 1052, 1056 (Colo. App. 1999).
55. *Scott v. Boma Inv. Co.*, 72 P.2d 274, 275 (Colo. 1937); *Weeks v. Esch*, 568 P.2d 494, 496 (Colo. App. 1977); *In re Specialized Installers*, 12 B.R. at 553 (stating that neither fraud nor a fiduciary relationship are required).
56. *First Nat'l Bank of Denver v. Harry W. Rabb Found.*, 479 P.2d 986, 989 (Colo. App. 1970).
57. *Walker v. Bruce*, 97 P. 250, 252 (Colo. 1908); *In re Marriage of Allen*, 724 P.2d at 657.
58. *Timothy C. Wirt, M.D., P.C. v. Prout*, 754 P.2d 429, 430 (Colo. App. 1988).
59. *Trusts and Trustees* § 473.
60. *Id.*
61. *Id.*
62. *Id.* at §§ 476 and 477.

63. *Id.* at § 475.
64. *Id.*
65. *United Fire & Cas. Co. v. Nissan Motor Corp.*, 433 P.2d 769, 771 (Colo. 1967) (quoting *Union Trust Co. of Newcastle v. Cwynar*, 131 A.2d 133, 137 (Pa. 1957)).
66. *Page*, 592 P.2d at 799.
67. *Mancuso*, 818 P.2d at 738.
68. *Id.*
69. *United Fire*, 433 P.2d at 771.
70. *Pioneer Real Estate, Inc. v. Larese*, 762 P.2d 720, 724 (Colo. App. 1988).
71. *See, e.g., Page*, 592 P.2d at 799.
72. *See Mancuso*, 818 P.2d at 737-38. *Mancuso* suggests that a constructive trust can arise from an abuse of a confidential or fiduciary relationship, implying that a fiduciary relationship is distinct from a confidential one. *See also Lewis v. Lewis*, 189 P.3d 1134, 1143 (Colo. 2008), which suggests that a confidential relationship can be an indication of a fiduciary relationship, again assuming the two are not synonymous.
73. *See* 79 Am. Jur. 3d *Proof of Facts* § 269 (2004) for a detailed discussion of constructive trusts in the context of an abuse of a confidential relationship.
74. *Page*, 592 P.2d at 798.
75. *Id.*
76. *Judkins v. Carpenter*, 537 P.2d 737, 738-39 (Colo. 1975); *Eads v. Dearing*, 874 P.2d 474, 477 (Colo. App. 1993); *Krueger v. Ary*, 205 P.3d 1150, 1154-55 (Colo. 2009).
77. *Anderson v. Lindgren*, 157 P.2d 687, 689 (Colo. 1945).
78. *Id.*
79. *Trusts and Trustees*, *supra* n. 16, at § 481.
80. *In Interest of Delluomo v. Cedarblade*, 328 P.3d 291, 293 (Colo. App. 2014).
81. *Heller v. First National Bank of Denver, N.A.*, 657 P.2d 992, 999-1000 (Colo. App. 1982).
82. *See In Interest of Delluomo*, 328 P.3d at 296.
83. *Id.* at 296-97.
84. A joint tenancy may be set aside without imposition of a constructive or resulting trust. A joint tenancy will be set aside if a proponent can show that the joint tenancy was created for “convenience or business necessity” and was not intended to create a right of survivorship. *In re Estate of Barnhart*, 563 P.2d 972, 975 (Colo. App. 1977).
85. Note that a constructive trust is not the only remedy available to the intended recipients. C.R.S. § 15-15-212(5) states that the proceeds of a multi-party account pass to the surviving owners unless there is clear and convincing evidence of a contrary intent. This clear and convincing evidence standard is higher than the preponderance of the evidence standard required for imposition of a constructive trust. It is arguable that seeking a constructive trust effectively lowers the standard required to defeat a joint owner’s rights to the proceeds of a joint account.
86. *See Page*, 592 P.2d at 798.
87. *Id.* (failure to honor promise can be sufficient abuse of confidential relationship to justify constructive trust).
88. C.R.S. § 15-11-804(2)(a).
89. *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 148 (2001).
90. Justin A. Kesselman, “Can State Law Remedies Revive Statutes Stricken by ERISA’s Preemption Provision?” 38 *ACTEC L. J.* 245, 251 (2012).
91. *Barnhart*, 563 P.2d at 976.
92. *Black’s Law Dictionary* (9th ed. 2009), lien [hereinafter *Black’s Law Dictionary*].
93. *Loring & Rounds*, *supra* n. 6, at § 7.2.3.1.4.
94. *Id.*
95. *Black’s Law Dictionary*, *supra* n. 92, at “lien.”
96. *Black’s Law Dictionary*, *supra* n. 92, at “subrogation.”
97. *Loring & Rounds*, *supra* n. 6, at § 7.2.3.1.7.
98. *Id.* at § 7.2.3.3.
99. *Black’s Law Dictionary*, *supra* n. 92, at “specific performance.”

