

THE TEXAS CONSTRUCTIVE TRUST AND ITS PECULIAR REQUIREMENTS*

David Dittfurth**

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I. INTRODUCTION

Consider two cases. In the first case, you represent the children of a woman who was intentionally and wrongfully killed by her husband. After having pled guilty to negligent homicide, the husband probates his wife’s will in which he is the sole beneficiary. In the second case, your client attempts an online transfer of her savings to another of her accounts but enters the account number erroneously and sends her life’s savings to a stranger’s account. The recipient of this windfall has withdrawn the money in cashier’s checks and refuses to return them to her.

Your clients want a court to order the properties’ transfer to them. Unfortunately, the frequently stated Texas rule appears to bar the constructive trust remedy they seek in both of these cases. When strictly applied, this “three-element rule” requires a plaintiff seeking a constructive

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** Professor of Law, St. Mary’s University School of Law; LL.M., University of Texas, Austin, 1973; J.D., University of Texas, Austin, 1967; B.A., University of Texas, Austin, 1965.

trust to prove: (1) that the defendant acquired property from the plaintiff through either breach of trust or fraud, (2) that allowing the defendant to retain the property would unjustly enrich him, and (3) that the defendant currently possesses the plaintiff's property or its traceable product.

Neither of the clients in these hypotheticals can prove acquisition of their property by breach of trust or fraud. The rule would seemingly deny them a constructive trust, leaving only the possibility of a monetary award. Although the Supreme Court of Texas has referred to this three-element rule as "generally required," the Court's decisions support a different approach. Those decisions indicate that the Texas Supreme Court is very likely to approve a constructive trust in both of these hypothetical cases.

In this Article, the Author argues that the stated rule should be modified to reflect those decisions. Such a modified rule would avoid the confusion caused by the three-element rule and free the constructive trust to better perform its function of protecting property rights.

II. THESIS

The Supreme Court of Texas has approved a constructive trust for the heirs described in the first—the slayer—hypothetical.¹ The Court has in fact ruled that a constructive trust can be used to return property acquired through a much wider array of wrongful conduct than breach of trust or fraud.² And as described in the body of this Article, the Texas Supreme Court has expressed approval of a constructive trust for the second hypothetical—mistaken payment—even when the defendant is innocent of wrongdoing.³

In reality, the Texas Supreme Court's decisions differ greatly from the three-element rule.⁴ Instead, the Court decides cases in a manner that more closely resembles the guidelines stated in the Restatement (Third) of Restitution and Unjust Enrichment.⁵ The Restatement declares that a

1. See *Bounds v. Caudle*, 560 S.W.2d 925 (Tex. 1978).

2. See *Kinsel v. Lindsey*, 526 S.W.3d 411 (Tex. 2017).

3. See *Zundell v. Gess*, 10 S.W. 693, 694 (Tex. 1889). Wrongdoing does have an effect on the measurement of restitution. See *infra* Part VI. For example, one who profits as a result of his breach of a fiduciary duty can be made to disgorge those profits. See *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 873 (Tex. 2010). Those profits can be represented by the enhanced value of identifiable property acquired by the defendant at the plaintiff's expense. See *id.* at 871–72. "[I]f the defendant is a conscious wrongdoer or a defaulting fiduciary, [a] constructive trust will often offer the most efficient means to strip the defendant of wrongful gains." RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. i (AM. LAW INST. 2011). When an innocent defendant will be unjustly enriched at the plaintiff's expense, the plaintiff can recover only the unenhanced value of the benefit acquired: "Against an innocent recipient, restitution from [such] property . . . will be accomplished . . . by equitable lien instead of constructive trust." *Id.* If, for example, an innocent recipient invests a mistaken payment in what is now a more valuable asset, the plaintiff can obtain a monetary award equal to the initial benefit secured by an equitable lien on that asset. See *id.*

4. See generally *Kinsel*, 526 S.W.3d 411; *Bounds*, 560 S.W.2d 925; *Zundell*, 10 S.W. 693.

5. Compare *Kinsel*, 526 S.W.3d 411, and *Bounds*, 560 S.W.2d 925 (imposing constructive trusts upon the property owner's death at the hand of the beneficiary and the beneficiary's undue influence to

constructive trust will lie “[i]f a defendant is unjustly enriched by the acquisition of title to identifiable property at the expense of the claimant *or* in violation of the claimant’s rights”⁶ This quote describes only two requirements for a constructive trust: tracing to “identifiable” property in the defendant’s hands and proof that retention of that property would unjustly enrich him.⁷ Furthermore, the Restatement recognizes alternate grounds for the requirement of unjust enrichment—either proof of defendant’s wrongful retention of another’s property or proof of his wrongful acquisition of that property.⁸

The pattern in Texas Supreme Court decisions has been obscured by the complications that arise from the application of statutory directives.⁹ The Court has long refused to allow a constructive trust to alter a statutory outcome unless that outcome was accomplished through wrongdoing.¹⁰ For example, courts have allowed a constructive trust to enforce promises invalid under the Statute of Frauds, but only when they arose from a breach of fiduciary duty or fraud.¹¹

For clarity in the law and for the protection of property rights, it is necessary to recognize that the Court’s analysis significantly modifies the three-element rule.¹² That modified rule—which is the actual Texas rule—allows a constructive trust under the following circumstances.

As a general rule, a plaintiff can obtain a constructive trust by proving that:

- (1) the defendant holds legal title to identifiable property acquired at the expense of the plaintiff or to its traceable product, and
- (2) allowing the defendant to retain this property would constitute unjust enrichment. However, if the constructive trust alters a statutory outcome, the plaintiff can satisfy the unjust-enrichment requirement only by proving the defendant caused that outcome through wrongdoing.¹³

transfer property of an individual with mental incapacity), *with* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 (AM. LAW INST. 2011) (defining broadly the scope under which a constructive trust forms).

6. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 (AM. LAW INST. 2011) (emphasis added).

7. *See id.*

8. *See id.* at § 55 cmt. b. The Restatement’s commentary notes that the modern law no longer requires “that the parties have ever occupied a fiduciary or confidential relation.” *See id.*

9. *See Faville v. Robinson*, 227 S.W. 938 (Tex. 1921).

10. *See id.* (refusing to apply the Statute of Frauds because the promise made was fraudulent).

11. *See, e.g., Meadows v. Bierschwale*, 516 S.W.2d 125, 129 (Tex. 1974).

12. *See Kinsel v. Lindsey*, 526 S.W.3d 411, 424 (Tex. 2017) (rejecting the defendant’s interpretation of the three-element rule as too narrow).

13. *See id.*; *see also Holmes v. Kent*, 221 S.W.3d 622, 628–29 (Tex. 2007) (per curiam) (finding a constructive trust inapplicable for an optional annuity payment because equity and justice did not require this).

First, tracing—that is, proof the defendant holds identifiable property taken at the expense of the plaintiff—is always essential in proving the plaintiff’s superior equitable title.¹⁴ The judicial remedy only enforces equitable ownership to specific, existing property.¹⁵ Second, in general, the unjust-enrichment requirement can be satisfied by proof of the defendant’s wrongful acquisition of the plaintiff’s property,¹⁶ but even innocent recipients of that property can be unjustly enriched.¹⁷

However, a plaintiff must prove the defendant acquired her property because of wrongdoing if the constructive trust divests her of a benefit conferred by statute.¹⁸ For example, failure to execute a will causes one’s estate to pass according to the statute of descent and distribution.¹⁹ This statute determines who benefits from the estate, and those beneficiaries, even if unintended recipients, are not thereby unjustly enriched.²⁰ In contrast, if some of those heirs had wrongfully prevented the will’s execution, the beneficiary under the will can prove his or her unjust enrichment.²¹ In deciding a similar situation in *Pope v. Garrett*, the Texas Supreme Court found all of the heirs unjustly enriched, stating that “[b]ut for the wrongful acts [even] the innocent defendants would not have inherited interests in the property.”²² The constructive trust can thereby nullify the manipulative effect of the wrongful conduct while not undermining the applicable statutory policies.²³

14. See, e.g., *Castano v. Wells Fargo Bank*, 82 S.W.3d 40, 41–42 (Tex. App.—San Antonio 2002, no pet.) (detailing the record of ownership of certain funds).

15. See *id.* This focus is essential to the judicial remedy, but a statute may authorize a constructive trust without requiring tracing to property currently in the trustee’s hands. See TEX. FAM. CODE ANN. § 9.011(b) (West 2017). For example, the Texas Family Code allows a court to impose a constructive trust to secure a party’s rights to property not currently possessed by another but to be acquired in the future, such as pension payments. See *id.*

16. See *Pope v. Garrett*, 211 S.W.2d 559, 560 (Tex. 1948). Either breach of a fiduciary duty, or fraud, for example, always satisfy the unjust-enrichment requirement needed to enable a court to enter a constructive trust. See *id.* However, listing both these forms of wrongful acquisition and proof of unjust enrichment as requirements for a constructive trust effectively makes the unjust-enrichment requirement superfluous. See *infra* Section VII.B (explaining this reasoning).

17. See, e.g., *Castano*, 82 S.W.3d at 40 (upholding a constructive trust that returned \$203,000 mistakenly transferred funds to the account of an innocent recipient).

18. See *Holmes*, 221 S.W.3d at 628–29.

19. See TEX. EST. CODE ANN. §§ 201.001–.003 (West 2017).

20. See *Holmes*, 221 S.W.3d at 629.

21. See *id.*

22. *Pope v. Garrett*, 211 S.W.2d 559, 562 (Tex. 1948).

23. See *id.* In discussing the balancing of the right to restitution against the unenforceability of an oral agreement, the Restatement describes the use of wrongful conduct as a clumsy test. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 31 cmt. g (AM. LAW INST. 2011). The Restatement does, however, distinguish the generalized directive of a Statute of Frauds from a more precisely targeted statute. *Id.* Restitution to enforce agreements barred by the latter is more likely to undermine the statute’s policies. See *id.* at § 31 cmt. h. Even in Statute-of-Frauds cases, however, the Texas Supreme Court has avoided open-ended balancing by requiring wrongdoing of some sort to justify the alteration of a statutorily directed outcome. See *Pope*, 211 S.W.2d at 561. This approach has at least

III. CONSTRUCTIVE TRUST MECHANICS

A. *Judicial Remedy*

The courts of equity created the law of trusts, which made possible the separation of legal and equitable ownership.²⁴ As it developed, the law of trusts allowed an owner to convey property's legal title to a trustee but required that trustee to use the property for the benefit of another—the equitable owner.²⁵ Allowing a trustee this control over legal title also made misuse of that power possible.²⁶ To counter such dangers, equity created a right of action founded on the equitable obligation of a trustee to act in good conscience.²⁷ Fiduciary duties were imposed to describe this obligation in more detail.²⁸ The fiduciary relationship also imposed a presumption of unfairness that placed the burden of rebuttal on any trustee who profited at the trust's expense.²⁹

The constructive trust remedy originally enforced a trustee's obligations in the context of an express trust.³⁰ If, for example, the trustee acquired legal title to property that, in equity, belonged to the trust, a court could declare the formal trustee a "constructive trustee," holding that property for the benefit of the trust.³¹ Trustees invariably argue that they hold such property in their own name and for their own benefit, but a constructive trust is imposed as a matter of law without regard to the intentions of the parties.³²

These origins and the continued use of trust language have to some degree induced a belief in a limited role for the remedy. However, the modern constructive trust operates well beyond the realm of express trusts.³³ It provides a means for returning property to its rightful owners and preventing the defendant's unjust enrichment.³⁴ A constructive trust allows this specific restitution only when a plaintiff can "trace" her right of

the potential of greater predictability, and it demands a greater level of respect for legislative decisions. *See id.*

24. *See* 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 2.1(1) (2d ed., West Publishing Co. 1993). The courts of equity used the principle of good conscience and its injunctive power to mold the remedies it used to enforce the trust relationship. *See id.*

25. *See id.*

26. *See id.*

27. *See id.*

28. *See id.* at § 4.3(2).

29. *See, e.g.,* *Int'l Bankers Life Ins. v. Holloway*, 368 S.W.2d 567, 577 (Tex. 1963) (stating that officers of a corporation are fiduciaries and have the burden of proving the fairness of any profit made at the corporation's expense).

30. *See* DOBBS, *supra* note 24, at § 2.1(1).

31. *See id.*

32. *See Int'l Bankers Life*, 368 S.W.2d at 590.

33. *See* DOBBS, *supra* note 24, at § 4.3(2).

34. *See Int'l Bankers Life*, 368 S.W.2d at 597.

ownership to existing, identified property held by the defendant.³⁵ After proving this right, the final stage of the remedy is a mandatory injunction that commands a defendant to return the property to the plaintiff.³⁶

This injunction, issued as an *in personam* order directed to the defendant, is enforceable through a court's contempt power.³⁷ The sanctions of contempt can include fines and incarceration, and these potential punishments tend to encourage compliance.³⁸ The power of the court thus lies behind enforcement of a constructive trust, and a plaintiff obtains the remedy while avoiding the risks and burden of executing a judgment.³⁹ In addition, a constructive trust gives the plaintiff priority over unsecured creditors in bankruptcy⁴⁰ or over other competing creditors.⁴¹ Although it does not override title transferred to a bona fide purchaser,⁴² it can attach to the proceeds of that sale held by the defendant.⁴³ A monetary judgment offers none of these benefits and cannot therefore be considered an adequate alternative.⁴⁴

B. Statutory Remedies

Although beyond the scope of this Article, numerous statutes authorize a constructive trust for violations of their substantive provisions. The text of such statutes controls the remedy's application and, if conflicting, will override judicial restrictions.⁴⁵ On the other hand, courts assume a statutory

35. See *In re Hayward*, 480 S.W.3d 48, 52 (Tex. App.—Fort Worth 2015, no pet.) (holding that a constructive trust cannot be imposed on unidentifiable cash proceeds).

36. See *id.* Although a constructive trust is a remedy issued in the court's decree, that decree recognizes equitable ownership that existed at the time of the relevant transaction. See *id.* As a consequence, the plaintiff's equitable title would be protected from the time of that transaction. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. i (AM. LAW INST. 2011); see also George P. Roach, *Unjust Enrichment in Texas: Is It a Floor Wax or a Dessert Topping?*, 65 BAYLOR L. REV. 153, 229–30 (2013) (explaining that a constructive trust comes into existence when the defendant “unjustly obtains legal title”). It is from this point that one calculates profits made from the property and that initiates the beneficiary's priority over creditors. See *id.* at 230.

37. See *In re Henry*, 154 S.W.3d 594, 597 (Tex. 2005); *Ex parte Preston*, 347 S.W.2d 938, 940 (Tex. 1961); *In re R.E.D.*, 278 S.W.3d 850, 860 (Tex. App.—Houston [1st. Dist.] 2009, no pet.).

38. See *Ex parte Preston*, 347 S.W.2d at 943 (holding that a husband who held community property as a constructive trustee could be incarcerated for his refusal to pay that money).

39. See *id.*

40. See *Haber Oil Co. v. Swinchart (In re Haber Oil Co.)*, 12 F.3d 426, 436 (5th Cir. 1994).

41. See *Marathon Mach. Tools, Inc. v. Davis-Lynch, Inc.*, 400 S.W.3d 133, 136–37 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (holding a constructive trust attached to property purchased with stolen funds).

42. See *MBank Waco, N.A. v. L. & J., Inc.*, 754 S.W.2d 245, 252 (Tex. App.—Waco 1988, writ denied).

43. See *Meadows v. Bierschwale*, 516 S.W.2d 125, 133 (Tex. 1974).

44. See generally *Bryan v. Citizens Nat'l Bank*, 628 S.W.2d 761, 762–63 (Tex. 1982).

45. If a statute's language provides the conditions for application of a statutory constructive trust, it would necessarily override contrary judicial limits. However, in the absence of a comprehensive explanation, a statutory constructive trust could incorporate elements of that remedy as found in court decisions. See, e.g., *Morton v. Nguyen*, 412 S.W.3d 506, 510–11 (Tex. 2013) (holding that the statutory

remedy adopts the elements of the comparable judicial remedy if its provisions do not say otherwise.⁴⁶ For example, the Texas Trust Act lists a constructive trust as one of the remedies for a trustee's breach, or imminent breach, of an express trust.⁴⁷ This provision does not elaborate on the guidelines for its application, and one assumes court-made rules would apply.⁴⁸ However, this constructive trust remedies a breach of a fiduciary duty, and the three-element rule would not restrict its intended application.⁴⁹

Section 9.011(b) of the Texas Family Code states, somewhat mysteriously, that the "subsequent actual receipt by the non-owning party of property awarded to the owner in a decree of divorce or annulment . . . imposes a constructive trust on the property for the benefit of the owner."⁵⁰ This language allows a court's use of a constructive trust to protect an ex-spouse's right to a percentage of future pension payments.⁵¹ Unlike the court-made remedy, this statute expressly authorizes a court to impose a constructive trust on funds that do not exist in the hands of the non-owning party at the time of the decree.⁵² In contrast, § 9.009 of the Family Code authorizes a court to order delivery of specific existing property, which satisfies this requirement of the court-made remedy.⁵³ In addition, § 9.012(a) of the Family Code provides for the use of contempt against one who violates either the order authorized in § 9.011(b) or the order authorized in § 9.009.⁵⁴

Section 356.655 of the Texas Estates Code creates a cause of action for anyone who has an interest in an estate.⁵⁵ It expressly allows these interested parties to seek the return of estate property purchased by a representative of the estate.⁵⁶ Although not labeled a constructive trust, this order performs that remedy's essential function—it restores specific property to the estate.⁵⁷

The Texas Civil Practice and Remedies Code allows a constructive trust in a civil case to enforce laws against civil racketeering related to the

remedy of rescission included the element of mutual rescission); *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 826–27 (Tex. 2012) (holding that the DTPA's allowance of rescission included the common-law requirements of mutual rescission).

46. *See Morton*, 412 S.W.3d at 511. "Allowing a buyer to recover all benefits bestowed upon the seller upon rescission without also requiring the buyer to surrender the benefits that he received under the contract would result in a windfall inconsistent with the general nature of Subchapter D's cancellation-and-rescission remedy." *See id.*

47. *See* TEX. PROP. CODE ANN. § 114.008(a)(9) (West 2017).

48. *See id.*

49. *See generally id.*

50. TEX. FAM. CODE ANN. § 9.011(b) (West 2017).

51. *See id.*

52. *See id.* One could argue that the decree establishes the owning party's vested interest in the future payments at issue. That existing interest need only be traced to subsequently received funds. *See generally id.* The statute's controlling text, however, makes this argument unnecessary. *See generally id.*

53. *See* FAM. CODE § 9.009.

54. *See id.* at § 9.012(a).

55. *See* TEX. EST. CODE ANN. § 356.655(b)(3) (West 2017).

56. *See id.*

57. *See id.*

trafficking of persons.⁵⁸ Also related to the civil enforcement of criminal laws, several Texas statutes impose a constructive trust to implement the so-called slayer rule.⁵⁹ For example, § 844.404(a) of the Texas Government Code bars the Texas County and District Retirement System from paying any benefit to a beneficiary who causes the death of a family member.⁶⁰ Section 844.404(c) provides that if such a beneficiary has received these benefits he “holds all payments received in constructive trust for the rightful recipient.”⁶¹ In a similar manner, § 1103.151 of the Texas Insurance Code declares that a life insurance beneficiary forfeits his interest if he is a principal or an accomplice in “wilfully bringing about the death of the insured.”⁶² Section 1103.152 allows a contingent beneficiary not implicated in the killing to take the life insurance proceeds.⁶³ If no such beneficiary exists, § 1103.152(c) allows the nearest relative of the insured to recover the benefits.⁶⁴ These parties can thereby use a constructive trust to divest the guilty beneficiary of legal title and to turn over any benefits received.⁶⁵

IV. THE THREE-ELEMENT RULE

A. KCM Financial, LLC v. Bradshaw

Unlike these statutory constructive trust remedies, the court-made remedy depends on judicial rules and restrictions.⁶⁶ The most troublesome restriction on the constructive trust is the three-element rule mentioned in the introduction.⁶⁷ Among the three elements, the first imposes the least justified restriction by requiring every plaintiff seeking a constructive trust to prove the defendant acquired her property through either a breach of trust or fraud.⁶⁸ The other elements of the rule—the tracing and unjust-enrichment requirements—relate to the essential characteristics of this equitable remedy rather than to its distant origins.⁶⁹

58. See TEX. CIV. PRAC. & REM. CODE ANN. § 140.004(a) (West 2017).

59. See, e.g., TEX. GOV'T CODE ANN. § 844.404(a) (West 2017).

60. *Id.*

61. *Id.* at § 844.404(c).

62. TEX. INS. CODE ANN. § 1103.151 (West 2017).

63. See *id.*

64. See *id.* at § 1103.152(c).

65. See *Bounds v. Caudle*, 560 S.W.2d 925, 928 (Tex. 1978). Although the Texas Supreme Court approved the use of a constructive trust, it reversed the judgment for other reasons. See *id.* at 929–30.

66. See *supra* Part I (introducing the three-element rule).

67. See *supra* Part I.

68. See *supra* Part I. The older Statute of Frauds cases appear to give support for this first element. See, e.g., *Edwards v. Strong*, 213 S.W.3d 979, 980–81 (Tex. 1948) (ruling that a constructive trust is enforceable due to a breach of fiduciary duties). However, the Texas Supreme Court has recently both repeated this element and ignored it. See, e.g., *Kinsel v. Lindsey*, 526 S.W.3d 411, 424 (Tex. 2017) (rejecting a strict interpretation of the first element).

69. See *supra* Part I (explaining introducing the elements of the three-element rule).

Until very recently, a full elaboration of the three-element rule had appeared only in Texas courts of appeals' opinions.⁷⁰ The rule's restrictiveness was presumably secured by insisting on proof of each element in every case.⁷¹ In 2014, the Texas Supreme Court also appeared to adopt the three-element rule.⁷² In *KCM Financial, LLC v. Bradshaw*, it stated that:

Three elements are generally required for a constructive trust to be imposed under Texas law. The party requesting a constructive trust must establish the following: (1) breach of a special trust or fiduciary relationship or actual or constructive fraud; (2) unjust enrichment of the wrongdoer; and (3) an identifiable res that can be traced back to the original property.⁷³

The court noted that, "In weighing the imposition of a constructive trust, a court will identify whether a wrongful taking has occurred."⁷⁴ Although implied by the first element, this language emphasized the wrongfully acquired property requirement.⁷⁵

In 1960, the parents of Betty Lou Bradshaw sold the Mitchell Ranch and reserved one-half of any royalty interest that might be obtained in a future lease of the minerals for her.⁷⁶ Her parents also required that any mineral lease reserve no less than a one-eighth royalty interest, thereby preserving for her a minimum royalty interest of one-sixteenth.⁷⁷ Steadfast Financial, which later became KCM Financial, ultimately took ownership of the Mitchell Ranch's surface and mineral estates.⁷⁸

As the mineral estate owner, Steadfast possessed the executive power to enter into and amend oil and gas leases subject to Bradshaw's overriding one-half interest in any royalty.⁷⁹ In exercising this power, Steadfast entered a mineral lease with Range Productions in which it reserved a one-eighth royalty interest.⁸⁰ As a result, Bradshaw received the minimum one-sixteenth

70. See *In re Hayward*, 480 S.W.3d 48, 52 (Tex. App.—Fort Worth 2015, no pet.) (citing *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 87 (Tex. 2014)); *Hsin-Chi-Su v. Vantage Drilling Co.*, 474 S.W.3d 284, 299 (Tex. App.—Houston [14th Dist.] 2015, pet. denied); *Gray v. Sangrey*, 428 S.W.3d 311, 315 (Tex. App.—Texarkana 2014, pet. denied); *In re Marriage of Harrison*, 310 S.W.3d 209, 212 (Tex. App.—Amarillo 2010, pet. denied); *Hahn v. Love*, 321 S.W.3d 517, 533 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); *In re Lemons*, 281 S.W.3d 643, 647 (Tex. App.—Tyler 2009, no pet.); *Cote v. Texcan Ventures II*, 271 S.W.3d 450, 453 (Tex. App.—Dallas 2008, no pet.); *Hubbard v. Shankle*, 138 S.W.3d 474, 485 (Tex. App.—Fort Worth 2004, pet. denied); *Mowbray v. Avery*, 76 S.W.3d 663, 681 n.27 (Tex. App.—Corpus Christi 2002, pet. denied).

71. See, e.g., *Hubbard*, 138 S.W.3d at 485 (upholding denial of constructive trust because there was no breach of fiduciary duty or fraud).

72. See *KCM Fin. LLC*, 457 S.W.3d at 87.

73. See *id.*

74. See *id.*

75. See *id.*

76. See *id.* at 75.

77. See *id.* at 75 n.2.

78. See *id.* at 77 n.4.

79. See *id.* at 75.

80. See *id.* at 78.

royalty interest reserved for her by her parents.⁸¹ Steadfast obtained the remaining one-sixteenth royalty interest, which it assigned to a group referred to as the “Royalty Owners” by the Supreme Court.⁸²

Although Steadfast had to share the royalty interest with Bradshaw, it did not have to share any bonuses.⁸³ Bradshaw’s dissatisfaction with the lease arose because Steadfast allegedly failed to demand the then-market rate—a one-fourth royalty interest.⁸⁴ She contended that Steadfast bargained away this higher royalty, which it would have shared with her, in exchange for an unusually high lease bonus of more than \$13 million, which it did not share with her.⁸⁵ Bradshaw sued Steadfast, the Royalty Owners, and others.⁸⁶ She claimed that Steadfast breached the duty of good faith required by its executive authority, and she sought a constructive trust on the one-sixteenth royalty interest that it had assigned to the Royalty Owners.⁸⁷

The trial court entered summary judgments on behalf of Steadfast and the Royalty Owners.⁸⁸ In its decision, the Texas Supreme Court upheld the summary judgment for the Royalty Owners, but reversed the judgment entered in favor of Steadfast.⁸⁹ The Court concluded that Steadfast owed Bradshaw a duty of utmost good faith and fair dealing, even though it did not have to put her interests ahead of its own.⁹⁰ The Court therefore affirmed the court of appeals’ remand of Bradshaw’s breach-of-trust claim for trial.⁹¹

Bradshaw argued that Steadfast’s failure to obtain the one-fourth royalty reduced the value of her one-half interest in royalties from a one-eighth royalty interest (one half of a one-fourth royalty) to a one-sixteenth royalty interest (one half of a one-eighth royalty).⁹² Steadfast’s breach of duty, she reasoned, therefore cost her a one-sixteenth royalty interest, which equaled the interest assigned by Steadfast to the Royalty Owners.⁹³ Under this logic, she believed that the Royalty Owners should hold their one-sixteenth interest as constructive trustees for her benefit.⁹⁴ Combining their one-sixteenth royalty interest with her one-sixteenth royalty interest would give her the one-eighth interest she would have obtained if Steadfast had not engaged in self-dealing.⁹⁵

81. *Id.*

82. *Id.*

83. *See id.* at 75.

84. *See id.* at 78.

85. *Id.*

86. *Id.*

87. *Id.* at 86–87.

88. *Id.*

89. *Id.* at 74–75.

90. *Id.* at 82–84.

91. *Id.* at 85.

92. *See id.* at 78.

93. *Id.*

94. *Id.*

95. *See id.* at 88.

The Court denied her request for a constructive trust on the interest held by the Royalty Owners.⁹⁶ It did so because she failed to trace property taken from her to the royalties and royalty interest obtained by the Royalty Owners.⁹⁷ In the original transfer of the Mitchell Ranch, her parents reserved for her one half of any royalty interest obtained in a mineral lease.⁹⁸ They sold the other one-half interest along with the surface estate.⁹⁹ Her constructive-trust claim thus targeted property that she never owned.¹⁰⁰ The one-sixteenth royalty interest held by the Royalty Owners was not traceable to, or derived from, any interest in royalties that she obtained through her parents' reservation.¹⁰¹ Her constructive-trust claim, therefore, failed as a matter of law because she could not satisfy the tracing requirement of the rule.¹⁰²

One might be confused by the possibilities raised by the Court's remand of Bradshaw's breach-of-trust claim for trial. If she proved Steadfast's breach of duty, she would satisfy the first element of the three-element rule and, perhaps, the second as well. However, she would still be unable to prove her equitable ownership of the interests held by the Royalty Owners. She never held any right to the property they obtained by Steadfast's assignments.¹⁰³

The Court's recitation of the three-element rule was *obiter dictum*—at least to the extent of the first two elements.¹⁰⁴ However, statements of law made by the highest state court cannot be dismissed merely because they were not essential to its holding.¹⁰⁵ One can, however, note that the Court did not evaluate the first element of the rule and that it only recognized that element as “generally required.”¹⁰⁶

96. *Id.*

97. *See id.*

98. *See id.*

99. *Id.*

100. *See id.*

101. *See id.*

102. *See id.*

103. *See id.*

104. *See id.* The Court makes clear that a constructive trust cannot be imposed on property that is not traceable to property taken from the plaintiff. *See id.* at 87. Therefore, Steadfast's breach of its duty and any resulting unjust enrichment were individually and in combination insufficient to support a constructive trust. *See id.* at 90. Although this point was not decided, the failure of Steadfast to obtain a one-fourth royalty interest reduced rather than enhanced the interest assigned to the Royalty Owners. *See generally id.* at 86–90.

105. *See Elledge v. Friberg-Cooper Water Supply Corp.*, 240 S.W.3d 869 (Tex. 2007) (per curiam). In this case, the court of appeals referred to contrary statements by the Texas Supreme Court as *obiter dictum* and applied the four-year statute of limitations to an unjust enrichment claim. *Id.* at 870. The Court responded that, “Our statements that the two-year statute applies to unjust enrichment claims, though not essential to the outcomes in [two of its decisions], should have been followed.” *Id.*

106. *See Kinsel v. Lindsey*, 526 S.W.3d 411 (Tex. 2017).

B. Kinsel v. Lindsey

In May of 2017, the Texas Supreme Court issued its opinion in *Kinsel v. Lindsey*.¹⁰⁷ The defendants in this case argued that the trial court's constructive trust should be set aside because the evidence failed to establish either a breach of trust or fraud.¹⁰⁸ This absence seemingly required reversal of the constructive trust in light of the elements "generally required" under the three-element rule.¹⁰⁹ The Court responded by noting that this argument "views the permissible bases for a constructive trust too narrowly."¹¹⁰ The Court explained its broader interpretation by noting that in *KCM Financial* it had also "reaffirmed [its] statement in *Pope* that '[t]he specific instances in which equity impresses a constructive trust are numberless—as numberless as the modes by which property may be obtained through bad faith and unconscientious acts.'"¹¹¹

[In *Pope*, t]here was no need to establish a "special trust or fiduciary relationship" between the intended beneficiary and the heirs-at-law or establish that the heirs-at-law defrauded the decedent. Neither finding would be applicable to the facts at hand, and the *justification for a constructive trust is not so constrained*.¹¹²

Lesey Kinsel created an *inter vivos* trust as part of her estate plan and deeded to this trust the 60% interest she owned in her ranch.¹¹³ Prior to its fourth and fifth amendments and to the sale of the ranch, the trust apportioned Lesey's 60% interest to named stepchildren and step grandchildren.¹¹⁴ The residuary clause of the trust left everything else to her niece Jane Lindsey, who was also a co-trustee.¹¹⁵

In 2005, at the age of 92, Lesey moved from Beaumont to an assisted-living facility located in Fort Worth, where Jane and her brother Bob lived.¹¹⁶ In 2007, Lesey executed a fourth amendment to her trust, leaving the mineral estate in her interest in the ranch equally to Jane and Bob.¹¹⁷ In 2008, at Lesey's request, the owners of the other 40% of the ranch joined her in selling the ranch, and the trust received over \$3 million from the sale of

107. *Id.*

108. *See id.*

109. *See id.* at 425–26.

110. *See id.* at 425.

111. *Id.* at 426.

112. *Id.* (emphasis added).

113. *See id.* at 415.

114. *See id.* Many of these individuals also shared ownership of the remaining 40% interest in the ranch. *Id.*

115. *See id.*

116. *See id.*

117. *Id.* at 416.

her 60% interest.¹¹⁸ Shortly before she died in 2008, Lesey executed a fifth amendment to her trust that removed all mention of the ranch.¹¹⁹ Therefore, when she died, the trust by its terms passed the \$3 million in sales proceeds to Jane as the residual beneficiary.¹²⁰

Prior to the amendments and the sale of the ranch, the stepchildren and step grandchildren would have received Lesey's interest in the ranch.¹²¹ After her death, they had no right to receive any portion of the proceeds from the sale of Lesey's interest.¹²² Members of this group (the Kinsels) sued Jane Lindsey and others seeking damages and a constructive trust on the \$3 million in proceeds from the sale of Lesey's interest.¹²³ The plaintiffs asserted claims of tortious interference with their inheritance, statutory and common law fraud, and conspiracy.¹²⁴

The jury concluded that Jane had unduly influenced Lesey, who lacked the mental capacity to understand the consequences of her actions.¹²⁵ Jane had used her influence to convince Lesey to modify the trust and to sell the ranch.¹²⁶ Based on the jury's findings, the trial judge entered judgment for damages, attorney's fees, and a constructive trust on the sales proceeds held by the trust.¹²⁷ The Texas Supreme Court upheld the jury finding that Lesey lacked capacity to understand the nature of her acts and upheld the trial court's issuance of a constructive trust.¹²⁸ However, the Court affirmed the court of appeals in reversing the damages awarded on the alleged causes of action and the attorney's fees award.¹²⁹

First, the Court concluded that the plaintiffs had failed to provide any evidence of out-of-pocket damages caused by the defendants' fraud, and that the trial court's instruction in this regard was harmful error.¹³⁰ The Court also held that Texas does not currently recognize a cause of action for tortious interference with inheritance, and it refused to create one when the constructive trust was an adequate alternative.¹³¹ The Court rejected the plaintiffs' argument that it had approved a tortious interference with inheritance claim in its *Pope* decision.¹³² That case, the Court noted, involved

118. *Id.* at 417.

119. *Id.* at 418–20.

120. *See id.* at 418.

121. *See id.* at 415.

122. *See id.* at 418.

123. *Id.*

124. *Id.*

125. *See id.*

126. *See id.* at 421.

127. *Id.*

128. *Id.* at 423.

129. *Id.*

130. *See id.* at 421–22.

131. *See id.* at 424.

132. *See id.* at 423–24. In *Anderson v. Archer*, the court of appeals refused to recognize a damages cause of action for tortious interference with an inheritance and held that the Texas Supreme Court had

one of the many instances in which a court, acting in equity, could impose a constructive trust on property obtained through “unconscientious acts.”¹³³

In upholding the jury’s undue-influence and lack-of-capacity findings in *Kinsel*, the Court recognized that these justified setting aside the fourth and fifth amendments to the trust and the deed of sale.¹³⁴ However, the Court noted that undue influence was not an independent tort cause of action.¹³⁵ The undue-influence finding did provide grounds for setting aside Lesey’s otherwise valid acts and documents.¹³⁶ As a result, the Court held the jury’s “mental-incapacity finding, coupled with the undue-influence finding, provided a more than adequate basis for the trial court to impose a constructive trust.”¹³⁷ The undue-influence finding thereby revealed how the defendants would be unjustly enriched by retention of the proceeds from a now-invalid sale.¹³⁸

In approving the constructive trust in *Kinsel*, the Court necessarily broadened the justifications for a constructive trust.¹³⁹ No effort was made to characterize the undue-influence contention as a breach of trust or fraud.¹⁴⁰ The Court conceded that, in *KCM Financial*, it did recognize that breach of trust or fraud were “generally” necessary for a constructive trust.¹⁴¹ Nevertheless, it concluded that it had approved a constructive trust as a remedy for a much wider array of wrongs.¹⁴²

However, the Court did not describe the cause of action that supported the constructive trust in *Kinsel* or in *Pope*.¹⁴³ In *Kinsel*, the Court affirmed the court of appeals’ rejection of the plaintiffs’ fraud, tortious interference with inheritance, and conspiracy causes of action.¹⁴⁴ In addition, it rejected the plaintiffs’ contention that they were due damages under an undue-influence cause of action.¹⁴⁵ And even after rejecting these four possible causes of action, the Court approved the trial court’s judicial remedy

not accepted this cause in *Pope*. See *Anderson v. Archer*, 490 S.W.3d 175, 177–78 (Tex. App.—Austin 2016, pet. granted).

133. See *Kinsel*, 526 S.W.3d at 423. Because a tortious interference claim could not support the constructive trust in *Pope*, one can fairly ask what cause of action could. See generally *Pope v. Garrett*, 211 S.W.2d 559 (Tex. 1948). As discussed below, the actual cause of action is best described as one to prevent unjust enrichment of the heirs who, in *Pope*, received the decedent’s estate as a result of the wrongdoing of two of their number. See *infra* Part V.

134. See *Kinsel*, 526 S.W.3d at 419.

135. See *id.* at 423–25.

136. See *id.* at 419–21.

137. *Id.* at 427.

138. See *id.* at 425–26.

139. See *id.* at 425–27.

140. See *id.* at 427.

141. See *id.*

142. See *id.* at 426 (quoting *Pope v. Garrett*, 211 S.W.2d 559, 560 (Tex. 1948)).

143. *Id.* at 427; *Pope*, 211 S.W.2d at 560–61.

144. *Kinsel*, 526 S.W.3d at 418, 421, 423.

145. See *id.*

of constructive trust.¹⁴⁶ By elimination, and by the Court's language, the constructive trust in *Kinsel* is best explained as a judicial remedy granted upon proof of the substantive cause of action to prevent unjust enrichment.¹⁴⁷

V. THE FUNCTION OF WRONGDOING

A. *Altering Statutory Outcomes*

In his treatise, Professor Dobbs notes that the courts of equity created the constructive trust to remedy a breach of trust, but he concludes that this remedy no longer requires a fiduciary or confidential relationship.¹⁴⁸ Professor Dobbs argues that a constructive trust "is appropriate in any kind of unjust enrichment case and is in no way limited to cases of wrongdoing."¹⁴⁹ Limiting the remedy to violations of fiduciary duty or fraud is illogical, he argues, because a "constructive trust is based on property, not wrongs."¹⁵⁰

Professor Dobbs also recognizes an exception.¹⁵¹ This exception applies in cases in which a "court cannot find unjust enrichment at all unless there is wrongdoing."¹⁵² For example, he discusses the Statute of Frauds, which requires an agreement to convey land to be in writing.¹⁵³ If innocent parties orally agree to a sale of land not knowing of this requirement, granting a constructive trust gives effect to an agreement the legislature declared invalid.¹⁵⁴ On the other hand, a defendant who uses oral promises to fraudulently induce the plaintiff to convey her land to him should not be able to hide behind the Statute of Frauds.¹⁵⁵ In this instance, a constructive trust does not unduly endanger land titles, it prevents the manipulation of the statutory requirements.¹⁵⁶ That constructive trust also does not establish a precedent allowing other courts leeway to disregard the statute.¹⁵⁷ This reasoning leads to the conclusion that wrongdoing is a prerequisite for holding that enrichment conferred in part by statute is unjust.¹⁵⁸

146. *Id.* at 426–27.

147. *See id.* The Court does not fully explain its analysis on this point, but the factors it cites in support of the constructive trust remedy best describe a general cause of action to prevent unjust enrichment. *See id.* "A person who is unjustly enriched at the expense of another is subject to liability in restitution." RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (AM. LAW INST. 2011).

148. *See* DOBBS, *supra* note 24, at § 4.3(2), 597. "Sometimes it is still said that the constructive trust applies only to misdealings by fiduciaries or in cases of fraud. But this is a misconception." *Id.* at 597.

149. *Id.*

150. *Id.*

151. *Id.* at 598.

152. *Id.*

153. *See id.* at 599.

154. *Id.*

155. *See generally id.* at 597–99.

156. *See generally id.*

157. *See generally id.*

158. *See generally id.*

In *Holmes v. Kent*, the Texas Supreme Court made clear that, absent wrongdoing, outcomes resulting from the operation of statutes cannot unjustly enrich an unintended beneficiary.¹⁵⁹ In *Holmes*, Kent, the son of Mrs. McWhorter and executor of her estate, sued to obtain a constructive trust on the right to her retirement benefits held by the deceased's ex-husband.¹⁶⁰ Prior to her retirement as a teacher, McWhorter chose to have her retirement benefits paid through an optional annuity plan.¹⁶¹ When she retired, McWhorter received reduced annuity benefits so that her then-husband, Holmes, would receive annuity benefits after her death.¹⁶² These benefits would continue during the remainder of his life.¹⁶³

During the process of dissolving her marriage to Holmes, McWhorter attempted to substitute Kent and her daughter-in-law as joint beneficiaries of the optional annuity in place of Holmes.¹⁶⁴ This attempt ran afoul of statutory requirements for changing a beneficiary.¹⁶⁵ Under those requirements, she could only substitute one person—not two—and she was required to submit the proper form with either her husband's notarized consent or with a certified copy of an order of the court with jurisdiction over her marriage.¹⁶⁶

She subsequently obtained a divorce from Holmes and submitted her decree to the Teacher Retirement System (TRS).¹⁶⁷ That decree included language divesting him of any rights to her retirement benefits.¹⁶⁸ The TRS notified her that, because the decree did not explicitly order a change or revocation of the named optional annuity beneficiary, it was not effective.¹⁶⁹ TRS did, however, supply her with the language that, if included in the decree, would suffice.¹⁷⁰ However, McWhorter never altered the decree and never obtained Holmes' notarized consent to a change of his beneficiary status.¹⁷¹ That status, therefore, existed when she died.¹⁷²

The court of appeals reversed the trial court's summary judgment for Holmes and remanded with instructions to grant Kent a constructive trust if the trial court found McWhorter had intended to divest Holmes of those benefits.¹⁷³ The Texas Supreme Court reversed and rendered judgment for

159. See *Holmes v. Kent*, 221 S.W.3d 622, 629 (Tex. 2007) (per curiam).

160. See *id.* at 623.

161. *Id.*

162. See *id.*

163. See *id.*

164. *Id.* at 626.

165. See *id.*

166. See *id.*

167. *Id.*

168. See *id.*

169. See *id.* at 627.

170. See *id.*

171. See *id.*

172. See *id.*

173. *Id.* at 623.

Holmes.¹⁷⁴ It held that McWhorter's failure to abide by the statutory requirements prevented courts from enforcing her intent.¹⁷⁵ The Court declared that it did not "think a designated beneficiary wrong or unjustly enriched to receive what the retiree gave him and never took back."¹⁷⁶

Kent could not use a constructive trust to excuse his mother's noncompliance without undermining the relevant statutes.¹⁷⁷ In *Holmes*, McWhorter's own delay or negligence left the ex-husband with benefits she clearly intended to withdraw.¹⁷⁸ The Court held that she could have enforced her intent in this regard by action in accordance with the statute, but she failed to do so.¹⁷⁹ As a result of her failure, she allowed the relevant statutes to enrich Holmes.¹⁸⁰ Because this enrichment occurred as a result of statutory directives, however, it could not be unjust.¹⁸¹ Having no wrongdoing to cure, judicial intervention based solely on a court's general notions of equity would disrupt legislative requirements and policies.¹⁸²

B. Breach of Trust or Fraud

In Statute-of-Frauds cases, the Texas Supreme Court has allowed a constructive trust to enforce otherwise invalid oral promises so long as the plaintiff's reliance was based on breach of trust or fraud.¹⁸³ Needing some wrongdoing to justify the plaintiff's credulity, the most obvious would be deceit.¹⁸⁴ These forms of wrongdoing were used because of the need to justify the plaintiff's reliance on oral promises. They were not intended to be universal conditions for a constructive trust.¹⁸⁵

174. *Id.* at 629.

175. *Id.* at 628.

176. *Id.* at 629.

177. *See id.*

To impose a constructive trust on optional annuity payments to a designated beneficiary in this situation, we must first attempt to ascertain if that is what the retiree really wanted, then effectively alter the statutory scheme for benefits provided when a beneficiary has been changed, and finally open TRS's retirement system to similar claims by others. We see nothing equitable or just in this.

Id. at 628–29.

178. *See id.*

179. *Id.* "McWhorter never took any of the relatively simple steps TRS explained to change or revoke the beneficiary designation . . ." *Id.* at 628.

180. *See generally id.*

181. *See id.*

182. *See id.*

183. *See Meadows v. Bierschwale*, 516 S.W.2d 125, 129 (Tex. 1974). In this opinion, the Court characterized those cases in which a constructive trust was subject to "stringent prerequisites" as those enforcing an oral contract to convey land in conflict with the Statute of Frauds. *See id.*

184. *See id.*

185. *See id.* The Texas Supreme Court rejected such an interpretation in *Kinsel*. *See Kinsel v. Lindsey*, 526 S.W.3d 411, 421 (Tex. 2017).

One begins by recognizing that a court cannot give effect to an otherwise invalid oral contract merely because the plaintiff was careless.¹⁸⁶ Because benefits received as a result of the intended operation of a statute do not alone constitute unjust enrichment,¹⁸⁷ the refusal to carry out one's unenforceable promise would not justify its enforcement.¹⁸⁸ Furthermore, the operation of the statute cannot be ignored because of an uncalled-for reliance on another party.¹⁸⁹ On the other hand, if the plaintiff relied on such promises because they were made by a fiduciary or through fraud, reversing the effects of such conduct calls for the use of a constructive trust.¹⁹⁰

In *Faville v. Robinson*, a daughter conveyed land to her mother based on the mother's oral promise to re-convey that property by devise in her will.¹⁹¹ The mother subsequently repudiated that promise, and the daughter sued seeking to have a trust impressed on the land.¹⁹² The Texas Supreme Court held that the Statute of Frauds did not apply because breach of such a promise was "necessarily a fraud."¹⁹³ Although Texas law did not at this time require express trusts affecting land to be in writing, the Court imposed a "parol trust" rather than a trust intended by the parties.¹⁹⁴ Because the grantee's promise induced the conveyance, she could not be allowed to keep the benefit gained by her breach of good faith.¹⁹⁵ An early commentator noted that this use of a constructive trust does not violate the Statute of Frauds

186. See *Holmes*, 221 S.W.3d at 628.

187. See *id.* at 629.

188. See *Morrison v. Farmer*, 213 S.W.2d 813 (Tex. 1948). In this case, the respondent paid for a house based on the petitioner's oral agreement to put it on a lot he would purchase. *Id.* at 814. He promised that, after refurbishing the house, he would sell the house and lot to her for an agreed-upon price. *Id.* Conflict arose concerning the price, and the petitioner refused to convey. *Id.* The Court held that this was either an agreement for the sale of real estate or an agreement for the petitioner to hold the land in trust. *Id.* at 814-15. Neither could be enforced because they violated the Statute of Frauds. See *id.* The Court approved the court of civil appeals' rejection of a constructive trust because "the record contain[ed] no proof of misrepresentation, fraud or concealment to support" that remedy. *Id.*

189. See *id.* "[T]he fact that one businessman trusts another, and relies upon his promise to carry out a[n] oral contract, does not create a constructive trust." *Tyra v. Woodson*, 495 S.W.2d 211, 213 (Tex. 1973). The Court has refused, in the absence of either a breach of fiduciary duty or fraud, to use a constructive trust as a remedy for those who failed to read the terms of a deed before signing it. See *Thigpen v. Locke*, 363 S.W.2d 247, 252 (Tex. 1962).

190. See *Ginther v. Taub*, 675 S.W.2d 724, 728 (Tex. 1984). In *Ginther v. Taub*, the defendant's refusal to perform his oral promise to re-convey mineral interests was also tainted by the breach of a fiduciary relationship by another party who had induced the conveyance. See *id.*

191. See *Faville v. Robinson*, 227 S.W. 938 (Tex. 1921).

192. See *id.*

193. See *id.* The Court did not require proof that the mother never intended to perform her promise. *Id.* In other words, the Court did not require proof of fraudulent inducement. See *id.*

194. Even after Texas law required express trusts affecting land to be in writing, the *Faville* rule allowed use of a constructive trust to enforce such oral promises. See *Gray v. Mills*, 206 S.W.2d 278, 281-82 (Tex. Civ. App.—Fort Worth 1947), *aff'd*, 210 S.W.2d 985 (Tex. 1948).

195. See *id.*

because it returns the land to the grantor as a means not of specific performance but to restore the status quo.¹⁹⁶

The Texas Supreme Court supplemented this fraud explanation by describing a similar situation in *Mills v. Gray* as a breach of a confidential relationship.¹⁹⁷ In *Mills*, a married couple contemplating divorce conveyed land without written restriction to the wife's son.¹⁹⁸ She contended that her son had orally agreed to re-convey this property after the marital problems were resolved.¹⁹⁹ When the son refused to re-convey, the reconciled couple sought a constructive trust.²⁰⁰ However, the trial court excluded evidence of the oral agreement between the mother and son.²⁰¹

This case arose after the legislature amended the Texas Trust Act to require a writing for express trusts concerning title to land.²⁰² But the Texas Supreme Court held that this statute did not bar a constructive trust if the oral trust agreement was made by parties in a confidential relationship.²⁰³ The Court reversed the trial court's exclusion of evidence concerning the oral agreement and noted that, if "a constructive trust would have arisen by reason of the confidential relation between the parties," it would not violate the Statute of Frauds or the Texas Trust Act.²⁰⁴

The significance of a confidential family relationship established by *Mills* provides an explanation of the decision in *Faville v. Robinson*.²⁰⁵ In *Faville*, the Court appeared to find fraud without evidence of an intentional misrepresentation.²⁰⁶ The Court in *Mills* noted, however, that a confidential relationship can arise between a mother and a son (or a mother and a daughter, as in *Faville*²⁰⁷), and its breach would be a "constructive fraud" that would give rise to a constructive trust.²⁰⁸

In *Fitz-Gerald v. Hill*, the defendant objected to a constructive trust by arguing that no fiduciary relationship existed between parties doing business with mineral interests.²⁰⁹ The majority responded by finding that the pleadings and proof established a joint adventure among the parties, which

196. See James Barr Ames, *Constructive Trusts Based upon the Breach of an Express Oral Trust of Land*, 20 HARV. L. REV. 549, 551 (1907).

197. See *Mills v. Gray*, 210 S.W.2d 985 (Tex. 1948).

198. *Id.* at 986.

199. See *id.* at 986–87.

200. See *id.*

201. See *id.* at 987.

202. See *id.* The 1943 amendment to the Texas Trust Act imposed a Statute of Frauds to prevent the oral trusts that relate to real property. See TEX. PROP. CODE ANN. § 112.004 (West 2014).

203. See *Mills*, 210 S.W.2d. at 988–89.

204. *Id.* at 989.

205. See *id.*

206. See *Faville v. Robinson*, 227 S.W. 938, 938 (Tex. 1921).

207. See *id.*

208. See *Mills*, 210 S.W.2d at 988–89 (quoting G.G. Clark, Annotation, *Grantee's Oral Promise to Grantor as Giving Rise to Trust*, 159 A.L.R. 997 (1946)).

209. See *Fitz-Gerald v. Hill*, 237 S.W.2d 256, 261 (Tex. 1951).

imposed on each the highest duty to the others.²¹⁰ Having violated his duty, equity applied to force the defendant to “disgorge and to divide his gains” in accordance with the oral agreement.²¹¹

Justice Smedley, in dissent, contended that a fiduciary relationship does not arise from an oral agreement to enter a joint venture.²¹² It arises instead from a preexisting relationship of confidence that was not present in this case.²¹³ Therefore, he concluded, this constructive trust nullified the Texas Trust Act’s requirement of a written instrument for express trusts in land and subjected “land titles to attack and change by unaided testimony to an oral agreement”²¹⁴ He reasoned that the Texas Trust Act’s Statute of Frauds allows a constructive trust in only three instances: (1) a case for restitution, (2) a case with proof of fraud, or (3) a case with proof of a violation of an existing fiduciary relationship.²¹⁵ The exception for restitution, he noted, applied only when the defendant had acquired property from the plaintiff and would be unjustly enriched if allowed to retain it.²¹⁶ The plaintiffs in *Fitz-Gerald* sought property they never paid for or owned and therefore were not seeking restitution.²¹⁷ He also concluded that evidence of a defendant’s breach of an oral promise did not establish fraud.²¹⁸

The Texas Supreme Court in *Consolidated Gas & Equipment Co. of America v. Thompson* seemed to retreat from its ruling in *Fitz-Gerald*.²¹⁹ In *Consolidated Gas*, the Court held that proof of a defendant’s oral agreement to convey a one-sixteenth overriding royalty to the plaintiffs was invalid under either the Statute of Frauds or the Texas Trust Act.²²⁰ The jury found the plaintiffs were induced to obtain a lease and to assign it to the defendant by his promise to give them the overriding royalty.²²¹ Thereafter, he refused to perform.²²² The Court nevertheless reversed the lower courts’ constructive trust on the assigned lease.²²³ Unlike the facts in *Faville* or *Mills*, these parties were businessmen who had no familial or other confidential

210. *See id.* at 264.

211. *See id.*

212. *Id.* at 269–70 (Smedley, J., dissenting).

213. *See id.* at 272–73 (Smedley, J., dissenting).

214. *See id.* at 273 (Smedley, J., dissenting).

215. *See id.* at 271 (Smedley, J., dissenting).

216. *See id.* at 270 (Smedley, J., dissenting). This exception refers to the general acceptance of an unjust-enrichment claim in the absence of statutory directives. *Id.* (citing 2 AUSTIN WAKEMAN SCOTT, SCOTT ON TRUSTS § 462.1 (1939)).

217. *Id.* (Smedley, J., dissenting).

218. *See id.* at 271 (Smedley, J., dissenting).

219. *See Consolidated Gas & Equip. Co. v. Thompson*, 405 S.W.2d 333, 337 (Tex. 1966); *Fitz-Gerald*, 237 S.W.2d at 265.

220. *Consolidated Gas*, 405 S.W.2d at 337.

221. *Id.* at 336.

222. *See id.*

223. *Id.* at 337.

relationship with one another prior to the oral agreement.²²⁴ The Court explained its holding in the following manner:

Our holdings above cited are to the effect that for a constructive trust to arise there must be a fiduciary relationship before, and apart from, the agreement made the basis of the suit. Such is our holding here. As stated, the fact that one businessman trusts another, and relies upon his promise to carry out a contract, does not create a constructive trust. To hold otherwise would render the Statute of Frauds meaningless.²²⁵

In *Tyra v. Woodson*, the Court more directly questioned its holding in *Fitz-Gerald*.²²⁶ In *Tyra*, the parties orally agreed to enter a joint venture to acquire oil and gas interests.²²⁷ The plaintiffs had requested a written agreement, but the defendants refused to enter one.²²⁸ The Texas Supreme Court upheld the trial court's finding that no "separate fiduciary relationship" existed prior to the oral agreement to enter a joint venture to share oil and gas interests.²²⁹ It therefore followed from its decision in *Consolidated Gas* that, absent any fiduciary relationship, enforcement of the oral agreement through a constructive trust would violate the Statute of Frauds.²³⁰

In *Ginther v. Taub*, the Court explained its holding by stating that, "[w]e recognize that the Statute of Frauds prohibits title to real property interests from resting in parol. However, a constructive trust based on a prior confidential relationship and unfair conduct or unjust enrichment escapes this rule."²³¹ The constructive trust imposed on Taub's mineral interest was arguably justified by both a breach of trust and fraud. Taub had acquired mineral interests because of the fraudulent oral representations of MacNaughton, who purported to act as the plaintiffs' attorney.²³² Taub knowingly benefitted from this breach of an attorney's fiduciary obligations and from the attorney's fraud.²³³ The Court held that, "[T]he jury findings of fraud by MacNaughton to benefit Taub support the imposition of the constructive trust remedy" against Taub.²³⁴

224. See *id.* at 334–36; *Mills v. Gray*, 210 S.W.2d 985, 986–87 (Tex. 1948); *Faville v. Robinson*, 227 S.W. 938 (Tex. 1921).

225. See *Consolidated Gas*, 405 S.W.2d at 336.

226. See *Tyra v. Woodson*, 495 S.W.2d 211, 213 (Tex. 1973); *Fitz-Gerald v. Hill*, 237 S.W.2d 256, 265 (Tex. 1951).

227. See *Tyra*, 495 S.W.2d at 213.

228. See *id.* In rejecting the request for a writing, one of the defendants said that no one should do business with anyone who could not be trusted. See *id.*

229. See *id.*

230. See *id.*

231. See *Ginther v. Taub*, 675 S.W.2d 724, 728 (Tex. 1984).

232. See *id.* at 725.

233. See *id.* at 727.

234. *Id.*

Taub contended that he was an innocent beneficiary and had not participated in MacNaughton's wrongdoing.²³⁵ The Court responded that the "policy against unjust enrichment mandates that Taub not be allowed to retain the property he received as the beneficiary of MacNaughton's fraud."²³⁶ The Court went on to note that in *Pope v. Garrett* it "imposed a constructive trust on totally innocent beneficiaries of the wrongful act."²³⁷ Taub, who knew he had obtained a benefit because of MacNaughton's misrepresentations, deserved no better treatment than a wholly innocent beneficiary of wrongdoing.²³⁸

C. Violent Conduct

In its 1984 discussion of the *Pope* decision in *Ginther*, the Court placed no emphasis on the absence of a breach of trust or fraud in that 1948 decision.²³⁹ And as noted above, the *Pope* decision was cited as authority for the Court's recent refusal to restrict a constructive trust to these two forms of wrongdoing.²⁴⁰ The decision in *Pope*²⁴¹ has special significance because in *Kinsel*, the Court concluded that the constructive trust in that earlier decision was not based on a tortious-interference-with-inheritance cause of action.²⁴² In addition, the Court held that a constructive trust is a remedy for recovering benefits obtained as a result of violent conduct.²⁴³

This first point opens the door for the argument that the constructive trust in *Pope* remedied what was necessarily a claim for specific restitution to prevent unjust enrichment.²⁴⁴ The Texas Supreme Court in *Kinsel* rejected the Kinsels' argument that the cause of action for tortious interference with inheritance supported liability in *Pope*.²⁴⁵ This ruling seemingly leaves only an unjust-enrichment cause of action supporting that constructive trust.²⁴⁶

235. *Id.*

236. *Id.* at 728 (citing *Pope v. Garrett*, 211 S.W.2d 559, 562 (Tex. 1948)).

237. *Id.*

238. *See id.*

239. *See id.* The Court also cites *Meadows v. Bierschwale*, 516 S.W.2d 125, 131 (Tex. 1974), for the proposition that "constructive trusts, being remedial in character, have the very broad function of redressing wrong or unjust enrichment." *Id.*

240. *See Kinsel v. Lindsey*, 526 S.W.3d 411, 426 (Tex. 2017).

241. *See Pope*, 211 S.W.2d at 562.

242. *See Kinsel*, 526 S.W.3d at 425.

243. *See generally id.* In *Kinsel*, the Court made clear that in *Pope*, "[t]here was no need to establish a 'special trust or fiduciary relationship' between the intended beneficiary and the heirs-at-law or establish that the heirs-at-law defrauded the decedent." *See id.* at 426.

244. *See id.* at 423-26; *Pope*, 211 S.W.2d at 562. "The policy against unjust enrichment argues in favor of the judgment" of the district court, which extended Garrett's constructive trust to all of the assets in the estate. *Pope*, 211 S.W.2d at 562.

245. *See Kinsel*, 526 S.W.3d at 423.

246. *See id.* "The case [against the participating heirs] is a typical one for the intervention of equity to prevent a wrongdoer, who by his fraudulent or otherwise wrongful act has acquired title to property, from retaining and enjoying the beneficial interest therein . . ." *Pope*, 211 S.W.2d at 560.

In *Pope*, Ms. Garrett sued to obtain a constructive trust on the assets of the estate of her friend, Ms. Simons.²⁴⁷ That estate had passed to the heirs of Simons through the descent and distribution statute.²⁴⁸ Prior to her death, Simons exhibited an unexecuted will to a gathering of witnesses and family members, explained that the will gave her whole estate to Garrett, and expressed her intent to execute that will.²⁴⁹ Before she could do so, however, two of the family members present “by physical force or by creating a disturbance, prevented her from carrying out her intention to execute the will.”²⁵⁰ Shortly thereafter she lapsed into a coma and died without signing the will.²⁵¹

Although the trial court gave Garrett a constructive trust on all the assets in the estate, the court of civil appeals allowed it only on the portion held by the participating heirs—those who prevented the will’s execution.²⁵² The court of civil appeals concluded that only this portion could be subjected to a constructive trust.²⁵³ The Texas Supreme Court rejected this limited remedy and upheld the trial court’s constructive trust on the inheritance of both the participating and the nonparticipating heirs.²⁵⁴ The Court stated that, “The policy against unjust enrichment argues in favor of the judgment rendered herein by the district court [imposing the constructive trust on all heirs] rather than that of the Court of Civil Appeals.”²⁵⁵ The Court also cited with approval Dean Roscoe Pound’s observation of what he called “the typical case of constructive trust, namely, specific restitution of a received benefit in order to prevent unjust enrichment.”²⁵⁶

The Texas Supreme Court reasoned that this constructive trust did not undermine the statute of descent and distribution because “[b]ut for the wrongful acts[,] the innocent defendants would not have inherited interests in the property.”²⁵⁷ The Court recognized the danger posed by this remedy and noted that it must be used with caution so that it does not “defeat the purposes of the statute of wills, the statute of descent and distribution, or the [S]tatute of [F]rauds.”²⁵⁸ In this instance, however, the constructive trust could be used “in order that a statute enacted for the purpose of preventing fraud may not be used as an instrument for perpetrating or protecting a fraud.”²⁵⁹

247. See *Pope*, 211 S.W.2d. at 559.

248. See *id.*

249. See *id.* at 562.

250. *Id.* at 560.

251. *Id.*

252. See *id.* at 559.

253. *Id.*

254. See *id.* at 562.

255. *Id.*

256. *Id.*

257. *Id.*

258. See *id.*

259. See *id.* at 561.

Unlike the constructive trust requested in *Holmes*, the remedy in *Pope* reversed the consequences of the wrongdoing and thus did not contradict the intended operation of the statutes.²⁶⁰ Neither the statute of wills nor the statute of descent and distribution was designed to protect an outcome accomplished through violence.²⁶¹ And it was this violence that caused the unjust enrichment of all of the heirs.²⁶²

Although different in outcome, the Texas Supreme Court's decisions in *Holmes* and *Pope* are two applications of the same principle.²⁶³ In *Holmes*, the Court denied a constructive trust because the defendant's enrichment resulted from the decedent's failure to comply with statutory requirements.²⁶⁴ In the *Pope* case, Simons was in the process of executing her will in order to leave the whole of her estate to Garrett when she was violently prevented from doing so.²⁶⁵ To highlight the principle of these decisions, assume instead that Simons was overcome by illness at the scene and died before she signed the will. Her own delay, coupled with her illness, would therefore have caused her estate to pass according to the statute of descent and distribution.²⁶⁶ In this hypothetical, even the overwhelming evidence of Simons's intent could not prove the heirs' unjust enrichment.

Another Texas Supreme Court decision dealing with violent conduct presents an even starker inconsistency with the first element of the rule.²⁶⁷ In *Bounds v. Caudle*, the jury in the civil case found that the decedent's husband, who was the primary beneficiary under her will and life insurance policy, had "intentionally and wrongfully caused" her death.²⁶⁸ Although the Court reversed the lower courts for other reasons, it concluded that Texas law supports a constructive trust on property that passes by will or inheritance to a beneficiary who wrongfully kills the deceased.²⁶⁹

Statutory forfeiture of the life insurance proceeds was also authorized by what is now § 201.058 of the Texas Estates Code, if the husband had been convicted and sentenced for willfully killing the insured.²⁷⁰ However, the husband entered a plea bargain in his criminal case and was allowed to plead

260. Compare *Holmes v. Kent*, 221 S.W.3d 622 (Tex. 2007) (per curiam) (holding that a son could not use a constructive trust to excuse his mother's lack of enforced intent without undermining the statutes), with *Pope*, 211 S.W.2d at 559 (holding that imposing a constructive trust on all heirs followed the policy against unjust enrichment).

261. See *Pope*, 211 S.W.2d at 559.

262. See *id.* at 562.

263. See *Holmes*, 221 S.W.3d at 628–29; *Pope*, 211 S.W.2d at 561–62.

264. See *Holmes*, 221 S.W.3d at 623.

265. See *Pope*, 211 S.W.2d at 559–60.

266. See TEX. EST. CODE ANN. § 201 (West 2017).

267. See generally *Bounds v. Caudle*, 560 S.W.2d 925 (Tex. 1977).

268. See *id.*

269. See *id.* at 928; see also *Thompson v. Mayes*, 707 S.W.2d 951, 955 (Tex. App.—Eastland 1986, writ ref'd n.r.e.).

270. See EST. CODE § 201.058; see also *Bounds*, 560 S.W.2d at 925. This provision excuses this forfeiture from the constitutional and statutory bars on convictions that "work corruption of blood." *Id.*

nolo contendere to a charge of negligent homicide.²⁷¹ The Court held that, based on the civil jury's finding, the "common law constructive trust" could be impressed on property transferred by the wife's will without being inconsistent with that statute or its requirements.²⁷²

Powerful equitable, moral, and policy reasons justify using a constructive trust to implement the slayer rule.²⁷³ It prevents the unjust enrichment of a killer who would otherwise benefit under the will.²⁷⁴ Under traditional analysis, the slayer takes legal title through the probate of a valid will, but holds that title subject to a constructive trust for the one who has superior equitable title.²⁷⁵ The constructive trust thereby prevents what would otherwise be the unjust enrichment of the slayer.²⁷⁶

VI. INNOCENT BUT UNJUSTLY ENRICHED

The decisions discussed in Part V show why a finding of unjust enrichment requires wrongdoing when a statutory directive applies. In the following cases, the Texas Supreme Court and one court of appeals approved a constructive trust without regard to the defendant's wrongful acquisition of the property.²⁷⁷ These decisions thus impliedly reject a universal requirement of wrongdoing for a constructive trust.²⁷⁸

The constructive trust is a remedy that provides specific restitution—that is, it returns property to its rightful owner.²⁷⁹ The issue addressed here is whether Texas law affirmatively supports this form of restitution in the absence of wrongdoing.²⁸⁰ For example, does Texas law allow a constructive

271. *See Bounds*, 560 S.W.2d at 926.

272. *See id.* at 928. The Court calls this equitable remedy a "common law constructive trust" but this was a reference to its judicial, as opposed to statutory, authority and not to the historical origins of the remedy. *See id.*

273. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 45 cmt. c (AM. LAW INST. 2011).

274. *See generally id.*

275. *See Bounds*, 560 S.W.2d at 928 ("The trust is a creature of equity and does not contravene constitutional and statutory prohibitions against forfeiture because title to the property does actually pass to the killer. The trust operates to transfer the equitable title to the trust beneficiaries."). The Court was referring to Article I, § 21, of the Texas Constitution and, more particularly, to § 41(d) of the Probate Code (now § 201.058 of the Texas Estates Code), which provided that, "[n]o conviction shall work corruption of blood or forfeiture of estate except [in the case of a beneficiary in] a life insurance policy or contract who is convicted and sentenced" as a slayer of the insured. TEX. EST. CODE ANN. § 201.058 (West 2017).

276. *See Bounds*, 560 S.W.2d at 928. The heirs also could prevent unjust enrichment by obtaining a monetary award, but this remedy would at least temporarily leave the victim's estate in the hands of her slayer for possible disposal, waste, or hiding. *See id.*

277. *See* Angus S. McSwain, Jr., *Limitations Statutes and the Constructive Trust in Texas*, 41 BAYLOR L. REV. 429 (1989) (listing the various uses of a constructive trust by Texas courts including cases not dependent on wrongdoing).

278. *See supra* Part V (showing that wrongdoing is not essential for implementation of a constructive trust).

279. *See, e.g.,* McSwain, *supra* note 277 (discussing constructive trusts in Texas).

280. *See generally id.*

trust to recover property acquired because of mistaken payments by the plaintiff? In such cases, the plaintiff makes the mistake that enriches a defendant who is innocent of wrongdoing. Can the plaintiff in this instance recover the mistaken payment through restitution? Furthermore, can the plaintiff use a constructive trust for this purpose? That would undoubtedly be the case if Texas courts did not recite the three-element rule as a condition for that remedy.²⁸¹

Texas law indisputably allows a monetary award as *general* restitution to prevent unjust enrichment caused by mistaken payments.²⁸² In *Bryan v. Citizens National Bank*,²⁸³ the Texas Supreme Court expressly recognized this remedy and stated that,

a party who pays funds under a mistake of fact may recover restitution of those funds if the party to whom payment was made has not materially changed his position in reliance thereon. The purpose of such restitution is to prevent unconscionable loss to the party paying out the funds and unjust enrichment to the party receiving the payment.²⁸⁴

In that case, Citizens National Bank mistakenly paid a check over a stop payment order.²⁸⁵ It sued seeking return of these funds through a monetary award.²⁸⁶ The judgment for general restitution was reversed, however, and the Court remanded the case for trial on the issue of whether the drawer of the check was liable to the payee.²⁸⁷ The Court held that, though the law had been unclear, the bank retained its cause of action to seek restitution.²⁸⁸ It could not, however, recover on that cause of action in a manner that conflicts with applicable Uniform Commercial Code sections.²⁸⁹ In *Bryan*, therefore, the cause of action depended on proof that the payor on the check had a defense, which would support a claim that the payee was unjustly enriched by the mistaken payment.²⁹⁰

No obvious reason or policy justifies restricting this cause of action in a manner that prevents recovery of identifiable property acquired by use of a mistaken payment.²⁹¹ As the cases discussed below strongly indicate, the

281. See *supra* Part IV (discussing the three-element rule).

282. See generally *Bryan v. Citizens Nat'l Bank*, 628 S.W.2d 761 (Tex. 1982).

283. See *id.*

284. *Id.* at 763 (citations omitted).

285. See *id.* at 761.

286. See *id.* at 762.

287. See *id.* at 764.

288. *Id.*

289. See *id.*

290. See *id.*

291. A modern version of the law of unjust enrichment involves two central propositions, "first, that the common law incorporates a broad principle of liability based on unjust enrichment . . . second, that some characteristic remedial devices in equity (notably constructive trust) are likewise directed at the prevention of unjust enrichment, and should therefore be understood as alternative means to the same

Court is very likely to support a constructive trust for recovery of mistaken payments.²⁹² It has, in fact, expressly stated its approval of that result in the *Zundell* case.²⁹³

It should be noted, however, that an innocent recipient of mistaken payments has defenses that are not available against claims based on wrongdoing.²⁹⁴ For example, the Court notes in *Bryan* that a defendant without knowledge of the mistake may have materially changed position based on the mistaken payment.²⁹⁵ Satisfaction of that defense, or of others, can defeat the plaintiff's unjust-enrichment claim and thereby prevent restitution of any sort.²⁹⁶ In addition, a claim of unjust enrichment for mistaken payments cannot exist when in conflict with the terms of a valid and enforceable contract.²⁹⁷

In the introduction of this Article, a hypothetical was described in which a misdirected online transfer was traced to identifiable property.²⁹⁸ This hypothetical is drawn from the decision by the San Antonio Court of Appeals in *Castano v. Wells Fargo Bank*.²⁹⁹ In that case, Ms. Gonzales's troubles began when she asked her secretary to wire transfer \$152,604 to her Wells Fargo account in San Antonio.³⁰⁰ This automated computer transaction was completed solely by use of an account number.³⁰¹ Unfortunately, the secretary accidentally altered two numbers of that Wells Fargo account, and the money was thus mistakenly credited to the San Antonio Wells Fargo account of Mr. Castano, a stranger.³⁰²

ends." Andrew Kull, *James Barr and the Early Modern History of Unjust Enrichment*, 25 OXFORD J. LEGAL STUD. 297, 302–03 (2005).

292. See, e.g., *Zundell v. Gess*, 10 S.W. 693, 694 (Tex. 1889).

293. See *id.*

294. See *Bryan*, 628 S.W.2d at 761.

295. See *id.*

296. See *id.* at 767. Equitable reasons can justify retention of property obtained at the plaintiff's expense. See generally *id.* The recipient of a mistaken payment can retain that property because it extended valuable services in reliance on the mistaken payment, see *Holden Bus. Forms Co. v. Columbia Med. Ctr. of Arlington*, 83 S.W.3d 274, 278 (Tex. App.—Fort Worth 2002, no pet.); because he has changed his position due to the plaintiff's mistake, see *Lincoln National Life Ins. Co. v. Rittman*, 790 S.W.2d 791, 793 (Tex. App.—Houston [14th Dist.] 1990, no writ); or because the plaintiff is deemed a "volunteer", see RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 2(3) (AM. LAW INST. 2011). These defenses defeat the plaintiff's equitable rights by providing justification for the benefits obtained by the defendant, who is therefore not unjustly enriched.

297. *Sw. Elec. Power Co. v. Burlington N. R.R.*, 966 S.W.2d 467, 470 (Tex. 1998). The power company had entered a long-term contract with the railroad for the transportation of coal. *Id.* The railroad began making unforeseen profits because of the reduction of its costs, and the contract contained a provision for adjusting payments. *Id.* The jury found that this provision was not violated but that the railroad was nevertheless unjustly enriched. *Id.* The Court noted that the jury's finding of compliance with the contract foreclosed its finding of unjust enrichment. See *id.* at 469–70.

298. See *supra* Part I (laying out two cases to consider in light of this Article).

299. See *Castano v. Wells Fargo Bank*, 82 S.W.3d 40 (Tex. App.—San Antonio 2002, no pet.).

300. *Id.* at 41.

301. *Id.*

302. *Id.* at 42.

After discussing this unexplained deposit with bank officials, Castano withdrew the \$152,604, as well as his own \$2,000, as cashier's checks, and agreed with bank officials to place the larger check in a safety deposit box until the matter was cleared up.³⁰³ About this time, Gonzales asked her secretary to transfer another \$50,585 to her San Antonio account, but the secretary used the same altered account number and forwarded this sum as well to Castano's bank account.³⁰⁴ A few days later, Castano withdrew this money as another cashier's check and placed it in his safety deposit box.³⁰⁵

After Gonzales discovered the mistaken transfers, she notified Wells Fargo.³⁰⁶ The bank's officials sought return of the two cashier's checks that represented Gonzales's money, but Castano refused to return them.³⁰⁷ At that point, Gonzales sued Wells Fargo, which then interpleaded Castano.³⁰⁸ The trial court ordered Castano to return the two cashier's checks, representing Gonzales's \$203,189, to Wells Fargo, and ordered the bank to cancel the checks and deposit the money in Gonzales's account.³⁰⁹ The order applied only to these two specific items of property held by Castano—the two cashier's checks—that were the traceable product of Gonzales's mistaken transfers.³¹⁰

Upon appeal by Castano, the San Antonio Court of Appeals noted that the trial court's order was a constructive trust and that such remedies "have the broad function of redressing wrong *or* unjust enrichment"³¹¹ The court seemed to contradict this statement by noting that a "constructive trust can arise when there is a fiduciary relationship, a promise, a transfer of property with reliance on the promise, *and* unjust enrichment."³¹² However, the court held that a fiduciary relationship did exist because "Castano agreed to hold the funds in trust until the matter was 'cleared up.'"³¹³ Castano did in fact agree to hold the money in his safety deposit box pending an explanation of the windfall, but he entered this agreement after he had received the money.³¹⁴ He clearly did not, as the three-element rule requires, wrongfully acquire the money because of a breach of trust or fraud.³¹⁵

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *See id.*

311. *Id.* at 43 (citing *Ginther v. Taub*, 675 S.W.2d 724, 728 (Tex. 1984)) (emphasis added).

312. *Id.* (emphasis added). This statement appears to describe the first two elements of the three-element rule. *See id.*

313. *Id.*

314. *Id.* at 42.

315. *See generally id.*

Even as an innocent recipient, however, Castano had no right to the property.³¹⁶ He also had no defense to the contention that he would be unjustly enriched if allowed to retain Gonzales's money.³¹⁷ In addition, it was indisputable that the cashier's checks were the product of Gonzales's mistaken transfer.³¹⁸ The plaintiffs thereby satisfied the unjust-enrichment and the tracing requirements, and the absence of wrongdoing was simply irrelevant.³¹⁹

Even though the facts did not satisfy the three-element rule, the court of appeals was undoubtedly correct in upholding the constructive trust.³²⁰ Consider for a moment the alternative. If strict application of the three-element rule barred this constructive trust, Gonzales and Wells Fargo could presumably obtain general restitution through a monetary award. While Castano retained control over property that clearly belonged to Gonzales, the plaintiffs would have the burden of enforcing that judgment against his nonexempt assets.³²¹ During a suit in trial court for a monetary award, Texas law bars any provisional injunctive relief to freeze a defendant's assets.³²² Therefore, if denied equitable relief, the plaintiffs could not use a temporary injunction to freeze the cashier's checks.³²³ Castano would thereby have such leverage that he could obtain a settlement allowing him to keep part of Gonzales's money.³²⁴ The trial court and court of appeals avoided the injustice of such an alternative by imposing the constructive trust.³²⁵

In this day of online banking and payment systems, many residents of the state could be a keyboard click away from Gonzales's problem. Financial affairs could therefore become more dangerous if these mistakes could not be corrected by our most efficient judicial remedy. The San Antonio Court of Appeals avoided the three-element rule's barrier and reached the correct

316. *See id.* at 43.

317. *See id.* Texas law clearly supported recovery of a monetary award under these facts. *See Bryan v. Citizens Nat'l Bank*, 628 S.W.2d 761, 763 (Tex. 1982) (permitting a party to recover restitution of funds paid under a mistake of fact). The only question was whether Gonzales could obtain a constructive trust instead of a money judgment. *See Castano*, 82 S.W.3d at 42.

318. *See id.*

319. *See generally id.*

320. *See id.* at 43.

321. *See generally id.* Although these facts were not discussed in the case, Castano may not have possessed \$200,000 in readily available nonexempt assets when the judgment was finalized. The cashier's checks seem to provide a sufficient target, but they might not have been available when a final monetary award was issued.

322. *See Nowak v. Los Patios Inv'rs, Ltd.*, 898 S.W.2d 9, 10 n.2 (Tex. App.—San Antonio 1995, no writ) (listing cases in which the court had discretion to issue a preliminary injunction as to assets subject to equitable remedies). Neither a Texas nor a federal court will issue provisional injunctive orders to protect the enforcement of a common-law claim for damages, but in both court systems, however, a trial court can do so when the final remedy is primarily equitable, such as a constructive trust. *See generally id.*

323. *See Castano*, 82 S.W.3d at 43.

324. *See id.*

325. *See id.*

result, but the law should not require ingenious circumvention of announced rules of law in order to protect property rights.

Although *Castano* was not decided by the Texas Supreme Court, the Court has expressed support for this use of a constructive trust.³²⁶ Well over a century ago in *Zundell v. Gess*, the Texas Supreme Court stated its approval of a constructive trust remedy and of specific restitution for return of mistaken payments.³²⁷ In *Zundell*, the Court considered a Swiss bank's request for a constructive trust on the defendant's land to obtain money it had erroneously paid him.³²⁸ In discussing this remedy, the Court stated:

It may be conceded that "whenever one party has obtained money which does not equitably belong to him, and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it," a constructive trust will arise, whether the money came to the possession of such person by *accident, mistake of fact, or fraud* To enforce this trust, the money must be identified, or it must be clearly traced into property purchased with it. If this be done, it is the right of the beneficiary to have the money or property bought with it, and this right he may enforce against the trustee, or any one holding under him, who is not an innocent purchaser.³²⁹

The bank had erroneously reduced Swiss francs owed to Gess to dollars and forwarded to him \$1,073 instead of the correct amount, which was \$389.³³⁰ Gess allegedly used that money and other funds to purchase the home upon which the bank sought to impose a constructive trust.³³¹ The Texas Supreme Court held that the bank had failed to satisfy its burden of tracing the money to this land.³³² Because of this failure, it could not enjoy the remedy of a constructive trust on Gess's land.³³³ Had the bank satisfied this obligation, it presumably could have obtained a constructive trust even though its own mistake caused Gess's unearned benefit.³³⁴

Without requiring wrongdoing, the Court has also approved the constructive trust as a remedy for enforcing contractual wills.³³⁵ A court typically impresses this constructive trust on some part of the decedent's estate as probated under the breaching will.³³⁶ In *Wiemers v. Wiemers*,

326. See *Zundell v. Gess*, 10 S.W. 693, 694 (Tex. 1889).

327. See *id.*

328. See *id.* at 693.

329. *Id.* at 694 (emphasis added).

330. *Id.* at 693.

331. *Id.*

332. *Id.* at 695.

333. See *id.*

334. See *id.* at 694.

335. See *Wiemers v. Wiemers*, 683 S.W.2d 355, 357 (Tex. 1984); *Novak v. Stevens*, 596 S.W.2d 848, 853 (Tex. 1980).

336. See *Coffman v. Woods*, 696 S.W.2d 386, 388 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.); see also *Novak*, 596 S.W.2d at 853.

George and Ida Wiemers executed a joint will in 1951 that would ultimately devise their 125-acre homestead to their son Wesley.³³⁷ George died in 1960, and Ida probated the joint will.³³⁸ In 1972, she executed another will that conflicted with the 1951 will.³³⁹ Upon her death, the beneficiaries probated the 1972 will, but Wesley's wife and children sued for a constructive trust on the homestead.³⁴⁰ The Court held the 1951 will was a contractual will and that Wesley's wife and children could, therefore, obtain a constructive trust on the property devised to him in the will.³⁴¹

One might argue that Ida's 1972 will represented a breach of trust, but the Texas Supreme Court did not rely on, or even discuss, such wrongdoing.³⁴² Furthermore, the Court did not conclude that Ida was guilty of fraud.³⁴³ Instead, it granted the constructive trust to avoid unjust enrichment.³⁴⁴ The Court concluded that, "It would be manifestly unjust to permit the surviving party to the contract to disavow it . . . after the other party has fully performed by abiding by it until his ability to revise [the will] has been terminated by death."³⁴⁵

In *McGoodwin v. McGoodwin*, the Court dealt with a property settlement agreement that required a wife to convey to the husband her interests in a twenty-two-acre tract in exchange for the husband's payment of \$22,500.³⁴⁶ The husband failed to pay, and the trial court imposed a vendor's lien on the property and ordered it sold at foreclosure.³⁴⁷ The Court noted that under Texas law a property settlement in a divorce proceeding is treated as a contract and is controlled by the law of contracts.³⁴⁸ However, the Court held that when a grantor does not reserve an express lien securing payment of the purchase money, equity imposes a vendor's lien that can be enforced in a suit brought for that purpose.³⁴⁹ This vendor's lien "arose by implication, as a natural equity creating a constructive trust in the vendee . . ."³⁵⁰ An equitable lien and a constructive trust are related equitable remedies in that the equitable lien gives the plaintiff a security interest in an identifiable item

337. See *Wiemers*, 683 S.W.2d at 355.

338. *Id.* at 356.

339. *Id.*

340. *Id.* at 356–57.

341. See *id.* Unlike the will in *Wiemers*, a valid contract in a will executed after September 1, 1979, must state that a contract exists and include its material provisions. See TEX. EST. CODE ANN. § 254.004(a)(2) (West 2017).

342. See *Wiemers*, 683 S.W.2d at 356–57. Ida, now deceased, was not being sued for breach of contract, and the remedy of specific performance was not appropriate. See *id.*

343. See *id.*; *Novak v. Stevens*, 596 S.W.2d 848, 853 (Tex. 1980).

344. See *Wiemers*, 683 S.W.2d at 357.

345. *Id.* (quoting *Weidner v. Crowther*, 301 S.W.2d 621, 624 (Tex. 1957)).

346. See *McGoodwin v. McGoodwin*, 671 S.W.2d 880, 881 (Tex. 1984).

347. See *id.*

348. See *id.* at 882.

349. *Id.*

350. *Id.* (quoting *White, Smith & Baldwin v. Downs*, 40 Tex. 225, 231 (1874)); see *Magallanez v. Magallanez*, 911 S.W.2d 91, 95 (Tex. App.—El Paso 1995, no writ).

of the defendant's property while a constructive trust orders that property's transfer.³⁵¹

In another family law decision, the Texas Supreme Court granted a petition for a writ of habeas corpus to an ex-husband who had been confined for failure to comply with the trial court's order to pay real property taxes on the marital residence.³⁵² The Court held this confinement for a debt was in violation of the Texas Constitution, and he therefore could not be incarcerated for contempt of court.³⁵³ However, the Court distinguished this order to pay back taxes out of unidentified funds from a contempt order for failure to turn over community property.³⁵⁴

We have held that when a trial court finds that the particular property at issue currently exists and awards that property as part of the community estate's division, the contemnor is not indebted to the other party, but becomes a constructive trustee who holds that party's assets In this case, the Henrys' divorce decree did not indicate that funds to pay the property taxes presently existed³⁵⁵

The Court also noted that a constructive trust could be used to enforce a divorce court's order to turn over funds so long as that property was in existence and was identified.³⁵⁶

During the 1940s, the Texas Supreme Court decided two cases in which an owner of the surface estate of land defaulted on a note secured by both the surface and mineral estates.³⁵⁷ In both cases, the defaulting owner later acquired the surface and mineral estate of the property free of the preexisting mineral interests.³⁵⁸ In *Cecil v. Dollar*, Cecil executed a deed of trust binding a 640-acre tract of land to secure a note owed to Newman.³⁵⁹ A year later, Cecil conveyed the land to Blount in a deed that reserved one-half of the mineral interest.³⁶⁰ Blount also assumed payment of the Newman note.³⁶¹ Thereafter, Blount conveyed the land to Dollar, less Cecil's reserved one-half

351. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 56 cmt. b (AM. LAW INST. 2011).

352. See *In re Henry*, 154 S.W.3d 594, 595 (Tex. 2005).

353. See *id.* at 597.

354. See *id.*

355. *Id.* (citing *Ex parte Preston*, 347 S.W.2d 938, 940 (Tex. 1961)). Statutory authority for such a constructive trust was added in 1997 and can be found in Texas Family Code § 9.009. TEX. FAM. CODE ANN. § 9.009 (West 2017).

356. See *In re Henry*, 154 S.W.3d at 597. The order Henry disobeyed also required payment of child support, which was not a debt. *Id.* at 595. However, the contempt order did not distinguish the punishment for failure to pay child support from that imposed for failure to pay back taxes. See *id.* at 598.

357. See *Cecil v. Dollar*, 218 S.W.2d 448 (Tex. 1949); *Talley v. Howsley*, 176 S.W.2d 158 (Tex. 1943).

358. See *Cecil*, 218 S.W.2d at 448; *Talley*, 176 S.W.2d at 158.

359. See *Cecil*, 218 S.W.2d at 449.

360. *Id.*

361. *Id.*

mineral interest, and Dollar assumed liability to pay the Newman note.³⁶² Subsequently, Dollar failed to pay the Newman note, which he had extended, and then purchased the land at the trustee's sale free of any reservation of minerals.³⁶³

The facts showed that Dollar had sufficient funds to pay the Newman note but decided to default and purchase the property at foreclosure.³⁶⁴ The Court held that, "It would be unconscionable to allow [Dollar] to acquire the Cecil interest and thus unjustly enrich himself."³⁶⁵ The Court mentioned a general rule barring "one cotenant, without the consent of the others, to buy in an outstanding adversary claim to the common estate and assert it for his exclusive benefit."³⁶⁶ However, in explaining its decision, the Court distinguished its earlier decision in *Talley v. Howsley* by observing that the defaulting cotenant in that case, Will McKeichen, had not been shown to have been enriched by his default.³⁶⁷ In contrast, Dollar had intentionally defaulted and immediately benefitted from his own default.³⁶⁸ This evidence supported the conclusion that his purpose was to enrich himself unjustly at the expense of the mineral-interest holder.³⁶⁹

In *Talley*, Will McKeichen owned only the surface estate but had assumed primary liability to pay off the mortgage debt to Davis, and this debt was binding on both the surface and mineral estates.³⁷⁰ When McKeichen defaulted, Davis foreclosed and purchased the land at foreclosure—free of any claims to the mineral interest.³⁷¹ After one year, Davis sold part of the land without any reservation of minerals to Will McKeichen.³⁷² The Court refused to issue a constructive trust on the mineral estate because it noted that this remedy required a showing of fraud, which was not present in the case.³⁷³ However, the Court in *Cecil* based its approval of a constructive trust more directly on the defaulting cotenant's obvious attempt to enrich himself unjustly at the expense of his cotenants.³⁷⁴ It concluded that Dollar's purchase at foreclosure relieved Cecil's obligation under the debt, but Dollar

362. *Id.*

363. *Id.*

364. *Id.* at 449–50.

365. *Id.* at 450.

366. *Id.*

367. *See Talley v. Howsley*, 176 S.W.2d 158 (Tex. 1943); *see also Cecil*, 218 S.W.2d at 451.

368. *See Cecil*, 218 S.W.2d at 449–50.

369. *See id.*

370. *Talley*, 176 S.W.2d at 159.

371. *Id.*

372. *Id.*

373. *Id.* at 160.

374. *See Cecil*, 218 S.W.2d at 450. The Texas Supreme Court in *Cecil* spoke of the rule that barred a cotenant from acquiring an adverse claim to the common estate so as to divest his cotenants. *See id.* This rule was applied, however, because Dollar used foreclosure to unjustly enrich himself at the expense of his cotenants. *See id.*; *cf. Dickason v. Mathews*, 335 S.W.2d 658, 660–61 (Tex. App.—Amarillo 1960, writ ref'd n.r.e.) (stating the rule as a general equitable principle).

“acquired no better equitable title than he had prior to the sale.”³⁷⁵ Therefore, even though Dollar acquired legal title to the minerals, he held that interest as a constructive trustee for Cecil.³⁷⁶

In a breach of contract case, the Court also approved a constructive trust imposed on a specific fund in a Mexican bank.³⁷⁷ This constructive trust required the defendant to deposit the fund in the registry of a Texas trial court.³⁷⁸ The parties had, in Texas, agreed to jointly purchase a Mexican lottery ticket, and it turned out to be a winner.³⁷⁹ The defendant denied the agreement, however, and caused her son to collect the money and deposit it in a bank in Mexico.³⁸⁰ The Texas trial court ordered the defendant to deposit the plaintiff’s portion in the registry of the court, and the Texas Supreme Court upheld this order as well as the court of civil appeals’ characterization of that order as a constructive trust.³⁸¹ The trial court directed its order at a specific bank account under the defendants’ control into which they had deposited money that had been traced to money that, under the contract, belonged to the plaintiff.³⁸²

The Texas Supreme Court in *KCM Financial* cited its earlier decision in *Meadows v. Bierschwale*³⁸³ for the proposition that “[a] constructive trust is an equitable, court-created remedy designed to prevent unjust enrichment.”³⁸⁴ This quotation was also included in the Court’s more recent decision in *Kinsel*.³⁸⁵ In *Meadows*, Bierschwale hired Meadows to broker the sale of his apartment complex, and Meadows found a buyer in Herbert Oakes.³⁸⁶ Oakes paid for Bierschwale’s apartment complex with a set of promissory notes (the Black Hardware notes), and Bierschwale persuaded Meadows to take some of these notes as his commission.³⁸⁷ The notes, however, proved to be worthless.³⁸⁸

375. See *Cecil*, 218 S.W.2d. at 451.

376. See *id.*

377. See *Castilleja v. Camero*, 414 S.W.2d 431, 433 (Tex. 1967).

378. See *id.*

379. *Id.* at 425.

380. *Id.* at 424. This companion case held that the contract was not illegal and that the plaintiff had ownership of half of the winnings. See *id.*

381. *Id.* at 434.

382. See *id.* at 433. Although this order was described as a constructive trust, it could have been described as a temporary injunction. See *id.* An injunctive order of this sort could operate as specific performance although the property involved was not unique. See *id.*

383. See *Meadows v. Bierschwale*, 516 S.W.2d 125 (Tex. 1974).

384. *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 87 (Tex. 2014) (citing *Meadows*, 516 S.W.2d at 131).

385. See *Kinsel v. Lindsey*, 526 S.W.3d 411, 425 (Tex. 2017) (quoting *KCM Fin. LLC*, 457 S.W.3d at 87).

386. See *Meadows*, 516 S.W.2d at 127.

387. See *id.* at 127–28.

388. See *id.* at 128.

In the meantime, Oakes sold the apartment complex to Goldman, a bona fide purchaser, who also paid with promissory notes (the Goldman notes).³⁸⁹ In his suit to rescind the sale to Oakes based on fraud, Bierschwale obtained a constructive trust on the Goldman notes.³⁹⁰ This fraud placed Oakes in a position to benefit from the Goldman notes, which were the traceable product of the apartment complex sale.³⁹¹ Meadows intervened in this suit seeking both a monetary award against Oakes and a portion of Bierschwale's constructive trust on the Goldman notes.³⁹² Although it allowed Meadows a monetary award, the court of civil appeals denied him any part of the constructive trust obtained by Bierschwale.³⁹³

In reversing this part of the court of civil appeals' decision, the Texas Supreme Court held that Bierschwale must proportionately share the benefits of the constructive trust with Meadows.³⁹⁴ The Court concluded that Bierschwale could not enjoy this equitable remedy while denying Meadows the same equity.³⁹⁵ In explaining its ruling, the Court noted that constructive trusts "have the very broad function of redressing wrong *or* unjust enrichment" and that "no unyielding formula" binds a court of equity in "decreeing a constructive trust."³⁹⁶ In reality, Bierschwale gained a substantial profit from the Goldman notes and was further enriched by excluding Meadows.³⁹⁷ The Court thus used a constructive trust to prevent the unjust enrichment of a party even though he was innocent of wrongdoing.³⁹⁸

VII. THE MISLEADING NATURE OF THE RULE

A. Unanswered Questions

Until the *Kinsel* decision, the three-element rule's first element appeared to restrict a constructive trust to the restoration of property acquired through either a breach of trust or fraud.³⁹⁹ The Court's holding in *Kinsel* makes clear

389. *See id.* at 127.

390. *See id.* at 125.

391. *See id.* at 128.

392. *Id.*

393. *Id.*

394. *Id.* at 132–33.

395. *Id.* at 131–32.

396. *Id.* at 131 (emphasis added).

397. *See id.* at 132.

398. *See id.* at 133. In *Ginther v. Taub*, the Texas Supreme Court noted that in *Meadows* it recognized the broad function and remedial character of a constructive trust and how it was to be used "in keeping with the basic principles of equity and justice." *See Ginther v. Taub*, 675 S.W.2d 724, 728 (Tex. 1984).

399. The Court's statement of the rule as "generally required" in the *KCM Financial* decision prevents one from disregarding the rule. *See KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 87 (Tex. 2014). The San Antonio Court of Appeals did, however, find a way around it. *See Castano v. Wells Fargo Bank*, 82 S.W.3d 40, 43 (Tex. App.—San Antonio 2002, no pet.). One might say that it circumvented the rule in a good cause, but surely that good cause argues for an authoritative disavowal. *See generally id.*

that today a broader array of wrongful conduct can justify the remedy.⁴⁰⁰ Indeed, as noted above, the Court's past decisions establish a far broader basis for the remedy, and one that directly conflicts with the rule.⁴⁰¹ One concern is that the *Kinsel* decision does not explicitly approve a constructive trust on property acquired without wrongdoing.⁴⁰² The Court's older decisions support that conclusion, but the continued existence of the three-element rule raises a problem.⁴⁰³ The failure to repudiate the rule leaves courts, lawyers, and clients trapped by an express but controversial condition on an important remedy.⁴⁰⁴ That problem would be alleviated in part if the Court directly changed the rule to recognize that a constructive trust has a broad function of "redressing wrong or unjust enrichment."⁴⁰⁵

B. *The Superfluous Second Element*

In *Kinsel*, the Texas Supreme Court upheld the constructive trust used to prevent those defendants from enjoying the benefit of property acquired through their undue influence.⁴⁰⁶ The holding thus avoided a strict reading of the rule's first element.⁴⁰⁷ This constructive trust affected the funds acquired through undue influence⁴⁰⁸ and captured them in a specific trust fund.⁴⁰⁹ The Court thereby upheld the constructive trust while at least expanding the forms of wrongdoing that can support unjust enrichment.⁴¹⁰

If wrongdoing in some form is always required, the three elements of the rule do not make sense. Proof of the first (wrongful acquisition) and the third (tracing) elements invariably establish the defendant's unjust enrichment.⁴¹¹ Satisfaction of these elements thus makes the second element superfluous. For example, a cause of action for breach of fiduciary duty generally requires proof that the defendant's breach either caused the plaintiff injury or conferred a benefit on the defendant.⁴¹² By proving the defendant

400. See *Kinsel v. Lindsey*, 526 S.W.3d 411 (Tex. 2017).

401. See *Ginther*, 675 S.W.2d at 724.

402. See *Kinsel*, 526 S.W.3d at 411.

403. See *Holmes v. Kent*, 221 S.W.3d 622, 628 (Tex. 2001) (per curiam).

404. See generally *id.*

405. See *Kinsel*, 526 S.W.3d at 411 (quoting *Meadows v. Bierschwale*, 516 S.W.2d 125, 131 (Tex. 1974)).

406. See *id.* at 426–27.

407. See *id.* at 411.

408. See *id.* at 418.

409. See *id.* The plaintiffs originally agreed to allow Jane to use trust proceeds to pay her attorney's fees, but they subsequently sought to have her replenish those funds when they fell below the original \$3 million. See *id.* at 424.

410. See *id.* at 411.

411. See *supra* Part IV (discussing the three-element rule in greater depth).

412. *Graham Mortg. Corp. v. Hall*, 307 S.W.3d 472, 479 (Tex. App.—Dallas 2010, no pet.). The elements of a breach of fiduciary duty claim are: (1) a fiduciary relationship must exist between the plaintiff and defendant; (2) the defendant must have breached his fiduciary duty to the plaintiff; and (3) the defendant's breach must result in injury to the plaintiff or benefit to the defendant. See *id.*

obtained specific property by breaching his duty, the plaintiff would satisfy the first and the third elements of the rule.⁴¹³ That same proof will also establish the defendant's unjust enrichment.⁴¹⁴ How could allowing such a guilty defendant to retain property belonging to the plaintiff not be unjust?

For example, the Lindseys' undue influence in *Kinsel* allowed them to capture the \$3 million in sales proceeds from Lessey's 60% interest in the ranch.⁴¹⁵ By using undue influence to divert Lessey's ranch interest to themselves at the expense of the stepchildren and step grandchildren, they were unjustly enriched.⁴¹⁶ In other words, the wrongful conduct that allowed them to acquire another's property established unjust enrichment without any additional proof required.⁴¹⁷ As a result, when proof shows that the defendant has wrongfully acquired traceable property at the expense of the plaintiff, a further requirement of unjust enrichment is redundant.

However, this redundancy disappears if one recognizes that wrongful conduct is one, but not the only, way of proving unjust enrichment. As noted above, the Restatement (Third) requires proof of only tracing and unjust enrichment.⁴¹⁸ It recognizes that the finding of unjust enrichment can be proven either through wrongdoing or by showing the wrongfulness of the defendant's retention of the property at issue.⁴¹⁹ Therefore, specific restitution through a constructive trust should be available when tracing has been proven and when unjust enrichment is shown by one of the two bases for that conclusion—either wrongful retention or wrongful acquisition.⁴²⁰ The three-element rule's insistence on wrongdoing in every case serves no policy or purpose and confuses the matter as well.⁴²¹

C. Unjust-Enrichment Cause of Action

In the *Kinsel* decision, the Texas Supreme Court rejected a strict application of the first element of the rule because it viewed the "permissible

413. See *Longview Energy Co. v. Huff Energy Fund LP*, 533 S.W.3d 866, 875 (Tex. 2017). This conclusion assumes the plaintiff's proof shows that the specific property was acquired as a result of the defendant's breach of fiduciary duty. See *id.*

414. See *id.* at 873.

415. See *Kinsel*, 526 S.W.3d at 411.

416. See *id.*

417. *Id.*

418. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55(1) (AM. LAW INST. 2011).

419. See *id.*

420. See *id.* at § 55(1) cmt. f.

421. It is difficult to conjure a modern policy that would not be better served by a rule that omitted the restrictiveness of the first element. If strictly applied, the first element limits the remedial power of courts, but such a blanket restriction serves no particular policy. Requiring wrongdoing only furthers an important policy when that restriction on judicial power serves to protect legislative decisions.

bases for a constructive trust too narrowly.⁴²² The Court also appeared to recognize that a constructive trust primarily operates to prevent unjust enrichment however proven.⁴²³ It indicated as much when it stated that, a “constructive trust is an equitable, court-created remedy designed to prevent unjust enrichment”⁴²⁴ and that it returns property to “the one who is truly and equitably entitled to the same.”⁴²⁵ This opinion thus seems to accept much broader equitable justifications for the constructive trust, even though its ruling was based on undue influence.⁴²⁶

Another way of explaining the deficiency in the three-element rule is to recognize that the first element of the rule only pretends to be an essential characteristic of the remedy. In reality, it limits the remedy to a relatively limited number of causes of action.⁴²⁷ This restriction is significant because, as an equitable remedy, the constructive trust requires proof of an established cause of action.⁴²⁸ However, the plaintiff need only prove the elements of a cause of action justifying specific restitution before enjoying a constructive trust.⁴²⁹ In *Sherer v. Sherer*, the Texarkana Court of Appeals described the constructive trust as “merely the remedy used to grant relief on the underlying cause of action.”⁴³⁰ The court went on to identify some of those causes of action as ones for breach of fiduciary duty, conversion, or unjust enrichment.⁴³¹

422. See *Kinsel*, 526 S.W.3d at 425. Although the facts in *Kinsel* did not satisfy the rule’s first element, the Court noted that, “the justification for a constructive trust is not so constrained.” See *id.* at 426.

423. See *id.*

424. See *id.* (citing *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 87 (Tex. 2015)).

425. See *id.* at 423 (citing *Pope v. Garrett*, 211 S.W.2d 559, 560 (Tex. 1948)).

426. See *id.*

427. In addition to an express trust, fiduciary duties are attached to a limited number of formal relationships, including those between an attorney and client, principal and agent, and between partners. See *Meyer v. Cathey*, 167 S.W.3d 327, 330–31 (Tex. 2005); *Gregan v. Kelly*, 355 S.W.3d 223, 227 (Tex. App.—Houston [1st Dist.] 2011, no pet.). Courts also impose fiduciary obligations on what they characterize as informal or confidential relationships that arise from special relationships of trust. See *Meyer*, 167 S.W.3d at 331. Actual fraud requires an actor to knowingly make a false, material representation knowingly made with the intent to induce reliance, and that the representation induce reliance, and that the reliance injure the victim. See *Zorrilla v. AYPACO Constr. II, LLC*, 469 S.W.3d 143, 153 (Tex. 2015). A constructive trust can return property gained by a breach of a confidential relationship, usually referred to as a claim based on constructive fraud. See *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964). Constructive fraud can also arise from the breach of fiduciary duties even though the party’s actions were not intentionally fraudulent. See *Hubbard v. Shankle*, 138 S.W.3d 474, 483 (Tex. App.—Fort Worth 2004, pet. denied).

428. See, e.g., *Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 564–65 (Tex. 2014) (plurality opinion) (equating the terms “claim,” “cause of action,” and “chose in action” as references to the operable facts that give rise to a right to recover either a monetary or equitable remedy); *Willis v. Donnelly*, 199 S.W.3d 262, 279 (Tex. 2006) (holding that in the absence of a judgment of liability the petitioners’ take-nothing judgment on all claims required reversal of the constructive trust against them).

429. See *Sherer v. Sherer*, 393 S.W.3d 480, 491 (Tex. App.—Texarkana 2013, pet. denied).

430. *Id.*; see *David Wright Constr. Co. v. FDIC*, 424 S.W.3d 738, 742 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *In re Estate of Skinner*, 417 S.W.3d 639, 643 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

431. See *Sherer*, 393 S.W.3d at 491.

Because of the history and terminology of equity, laymen assume courts can just “do equity” without bothering with a recognized cause of action.⁴³² Fairness and good conscience certainly played an important role in equity jurisprudence, but Texas law conditions even equitable remedies on the satisfaction of a cause of action.⁴³³ For example, the paradigmatic equitable remedy is the injunction, but a permanent injunction cannot be granted without a finding of liability.⁴³⁴ Even a temporary injunction requires proof of established elements, the first of which is a cause of action.⁴³⁵

Although the Court has not expressly established the elements of a general unjust-enrichment cause of action, it has upheld what it identified as a judgment for unjust enrichment.⁴³⁶ In *HECI Exploration Co. v. Neel*, royalty owners sued HECI, their lessee, to recover a portion of the judgment HECI recovered against another operator for harm to the common pool.⁴³⁷ The lessors’ claim against the other operator was time-barred, and they contended that HECI had an obligation to notify them of its suit.⁴³⁸ One of the lessors’ causes of action was for unjust enrichment.⁴³⁹ The Court held that because HECI could not have asserted a claim on the lessors’ behalf, it could not be unjustly enriched at their expense.⁴⁴⁰ The Court did acknowledge that, “We have recognized that, in some circumstances, a royalty owner has a cause of action against its lessee based on unjust enrichment”⁴⁴¹ However, HECI had acquired no property in its settlement that belonged to the Neels.⁴⁴²

Having previously recognized the unjust-enrichment cause of action, the Texas Supreme Court need not go through the formal process of creating one.⁴⁴³ The Court, in the *Kinsel* decision, discussed the factors to be

432. See generally *id.*; *David Wright Constr. Co.*, 424 S.W.3d at 738; *In re Estate of Skinner*, 417 S.W.3d at 639.

433. See, e.g., *Sherer*, 393 S.W.3d at 491 (explaining that a constructive trust is a remedy, not a cause of action, and thereby must be supported by an underlying cause of action).

434. See *Etan Indus. Inc. v. Lehmann*, 359 S.W.3d 620, 625 n.2 (Tex. 2011) (citing *Valenzuela v. Aquino*, 853 S.W.2d 512, 514 n.2 (Tex. 1993)) (implying that the practical effect of a constructive trust results from the court’s issuance of a permanent injunction that mandates transfer of the property at issue).

435. See *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002) (“To obtain a temporary injunction, the applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.”).

436. See *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 685 (Tex. 2000).

437. See *HECI Expl. Co. v. Neel*, 982 S.W.2d 881, 884 (Tex. 1990).

438. See *id.*

439. *Id.*

440. *Id.* at 891–92. Only a plaintiff with standing can assert a claim for unjust enrichment, and standing requires proof that the defendant’s benefit was acquired either from or at the expense of the plaintiff. See *id.*

441. *Id.* at 891. The Court also recognized that “Unjust enrichment was the basis for recovery in *Gavenda v. Strata Energy, Inc.*” *Id.* (citing *Gavenda v. Strata Energy, Inc.*, 705 S.W.2d 690, 693 (Tex. 1986)).

442. *Id.* at 891–92.

443. See *id.*

considered in creating a cause of action for tortious interference with an inheritance.⁴⁴⁴ One important reason that the Court cited for not needing a new cause of action was the availability of adequate alternatives.⁴⁴⁵ The Court concluded that there was “no compelling reason to consider a previously unrecognized tort if the constructive trust proved to be an adequate remedy.”⁴⁴⁶ There are, however, no alternative remedies that would adequately replace a constructive trust when the defendant would otherwise be unjustly enriched by the plaintiff’s property.⁴⁴⁷

The Restatement (Third) suggests that liability for restitution depends on three elements: (1) the defendant has acquired a benefit, (2) at the expense of the plaintiff, and (3) retention of the benefit would unjustly enrich the defendant.⁴⁴⁸ It also makes clear that liability for restitution derives from a legal process by which a court determines that the defendant’s enrichment is unjustified in the sense that it “lacks an adequate legal basis”⁴⁴⁹ When the defendant cannot justify his enrichment by retention of property belonging to the plaintiff, a constructive trust is the most appropriate means of specific restitution.⁴⁵⁰ In order to establish the plaintiff’s equitable ownership, she must prove that the defendant currently possesses specific property acquired from, or at the expense of, the plaintiff.⁴⁵¹

VIII. CONCLUSION

The three-element rule does not reflect Texas Supreme Court decisions and, when taken seriously, disservices the public’s interest in protecting property rights. For the reasons discussed, it should be disavowed by Texas courts. The Court’s decision in *Kinsel v. Lindsey* arguably retained the rule but only as one of inclusion—that is, the rule describes those instances in which a constructive trust is clearly justified.⁴⁵² However, it can no longer be considered a rule of exclusion—that is, it does not describe the only

444. See *Kinsel v. Lindsey*, 526 S.W.3d 411, 423–25 (Tex. 2017).

445. See *id.* at 424–25.

446. *Id.* at 424.

447. See *id.* at 424–25.

448. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. i (AM. LAW INST. 2011); see also David Dittfurth, *Civil Liability for Unjust Enrichment*, 54 S. TEX. L. REV. 225, 232 (2012) (discussing these three elements of an unjust-enrichment cause of action).

449. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. b (AM. LAW INST. 2011). “Unjust enrichment” may appear to be a characteristic that becomes obvious on the face of the facts. In reality, the parties must apply legal rules and defenses to reach the conclusion that a defendant’s enrichment is “unjustified.” See *id.* (internal citation omitted).

450. See *id.* at § 55.

451. See *Longview Energy Co. v. Huff Energy Fund LP*, 533 S.W.3d 866, 875–76 (Tex. 2017) (holding that plaintiffs failed to satisfy their tracing obligation by failing to provide evidence showing which oil and gas leases were acquired as a result of the defendants’ alleged breach of fiduciary duty); see also *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 87 (Tex. 2014); *supra* text accompanying notes 96–102 (detailing how the plaintiff failed to show that the targeted interests were ever owned by her).

452. See *Kinsel*, 526 S.W.3d at 425–27.

instances in which a constructive trust is justified. Even as a rule of inclusion, the rule's many exceptions make it misleading.⁴⁵³

Instead of these three elements, the Court actually applies two general requirements with a restriction to protect statutory policies. The two requirements are tracing and unjust enrichment. In the absence of a conflicting statute, a plaintiff proves unjust enrichment by showing the defendant's wrongful acquisition of her property or by showing the lack of justification for allowing even an innocent defendant to retain that property. If a statute conferred a benefit on the defendant, his enrichment cannot be deemed unjust⁴⁵⁴ unless he used wrongdoing to bring about this result.⁴⁵⁵ Under these circumstances, proof of wrongdoing becomes necessary to satisfy the requirement of unjust enrichment and to avoid undermining the statute.⁴⁵⁶

This modified rule more accurately describes the Texas Supreme Court's practice and allows a more transparent and policy-sensitive analysis. If adopted, it would add clarity to the law, provide greater protection for property rights, and replace an anachronistic rule that frustrates both of those purposes.

453. See *supra* Part VII (explaining the misleading nature of the three-element rule).

454. See *Holmes v. Kent*, 221 S.W.3d 622, 629 (Tex. 2007) (per curiam).

455. See *Pope v. Garrett*, 211 S.W.2d 559, 562 (Tex. 1948).

456. See *supra* Part V (discussing the function of wrongdoing and when it is necessary).