

THE TEXAS CONSTRUCTIVE TRUST AND ITS PECULIAR REQUIREMENTS

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Consider two cases. In the first one, 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 erroneously enters the account number and sends her life's savings to a stranger's account. The recipient of this windfall has withdrawn the money in cashier's checks but refuses to return them to her.

Your clients want a court to order the property's 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 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," that court's decisions support a different approach. Those decisions indicate that the supreme court is very likely to approve a constructive trust in both of these hypothetical cases.

In this article, I argue 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.

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I. 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 supreme court has expressed approval of a constructive trust for the second – mistaken payment – hypothetical even when the defendant is innocent of wrongdoing.³

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

² See *Kinsel v. Lindsey*, __ S.W.3d __, 60 Tex. Sup. Ct. J. 1070, 2017 WL 2324392 (May 26, 2017).

³ See *Zundell v. Gess*, 73 Tex. 144, 10 S.W. 693, 694 (1889). See also *infra* Part V. Wrongdoing does have an effect on the *measurement* of restitution. 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. "[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

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

The pattern in Texas Supreme Court decisions has been obscured by the complications that arise from the application of statutory directives. The court has long refused to allow a constructive trust to alter a statutory outcome unless that outcome was accomplished through wrongdoing. For example, supreme court decisions 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.⁶

For clarity in the law and for the protection of property rights, it is necessary to recognize that the supreme court’s analysis significantly modifies the three-element rule. 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

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.

⁴ RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 55 (Am. Law Inst. 2011) (emphasis added).

⁵ 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.* at cmt. B.

⁶ *See infra* Part IV(B).

(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.

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. The judicial remedy only enforces equitable ownership to specific, existing property.⁷ Second, in general, the unjust-enrichment requirement can be satisfied by proof of the defendant’s wrongful acquisition of plaintiff’s property,⁸ but even innocent recipients of that property can be unjustly enriched.⁹

However, a plaintiff must prove the defendant acquired her property because of wrongdoing if the constructive trust divests him of a benefit conferred by statute. For example, failure to execute a will causes one’s estate to pass according to the statute of descent and distribution. This statute determines who benefits from the estate, and those beneficiaries, even if unintended recipients, are not thereby unjustly enriched.¹⁰ In contrast, if some of those heirs had wrongfully prevented the will’s execution, the beneficiary under the will can prove their unjust enrichment. In deciding a similar situation in the *Pope* case,¹¹ 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.”¹² The constructive trust can thereby nullify the manipulative

⁷ 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. 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* Tex. Fam. Code § 9.011(b).

⁸ 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. 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* Part VII(B).

⁹ *See, e.g.,* *Castano v. Wells Fargo*, 82 S.W.3d 40 (Tex.App.-San Antonio 2002, no pet.) (upholding a constructive trust that returned \$203,000 mistakenly transferred to the account of an innocent recipient). *See also infra* Part V.

¹⁰ *See* *Holmes v. Kent*, 221 S.W.3d 622, 629 (Tex. 2007) (per curiam).

¹¹ *Pope v. Garrett*, 211 S.W.2d 559 (Tex. 1948).

¹² *See id.* at 562.

effect of the wrongful conduct while not undermining the applicable statutory policies.¹³

II. Constructive Trust Mechanics

A. Judicial Remedy

The courts of equity created the law of trusts,¹⁴ which made possible the separation of legal and equitable ownership. As it developed, the law of trusts allowed an owner to convey property's legal title to a trustee but require that trustee to use the property for the benefit of another – the equitable owner. Allowing a trustee this control over property's legal title also made possible misuse of that power. To counter such dangers, equity created a right of action founded on the equitable obligation of a trustee to act in good conscience. Fiduciary duties were imposed to describe this obligation in more detail.¹⁵ 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.¹⁶

The constructive trust remedy originally enforced a trustee's obligations in the context of an express trust. 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. Trustees invariably argue that they hold such property in their own name and for their own benefit, but a constructive

¹³ *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) 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. Restitution to enforce agreements barred by the latter is more likely to undermine the statute's policies. *See id.* at 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. This approach has at least the potential of greater predictability, and it demands a greater level of respect for legislative decisions.

¹⁴ 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* 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION (2d ed. 1993) § 2.1(1).

¹⁵ *See id.* at § 4.3(2).

¹⁶ *See, e.g.,* Internatl' 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).

trust is imposed as a matter of law without regard to the intentions of the parties.¹⁷

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.¹⁸ It provides a means for returning property to its rightful owners and preventing the defendant's unjust enrichment.¹⁹ A constructive trust allows this specific restitution only when a plaintiff can "trace" her right of ownership to existing, identified property²⁰ held by the defendant. 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.²¹

This injunction, issued as an *in personam* order directed to the defendant, is enforceable through a court's contempt power.²² The sanctions of contempt can include fines and incarceration,²³ and these potential punishments tend to encourage compliance. 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. In addition, a constructive trust gives the plaintiff priority over unsecured creditors in bankruptcy²⁴ or over other competing creditors.²⁵ Although it

¹⁷ See *id.* at 590.

¹⁸ See DOBBS, *supra* note 14, at § 4.3(2).

¹⁹ See *Internatl' Bankers Life*, 368 S.W.2d at 597.

²⁰ 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).

²¹ 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. As a consequence, the plaintiff's equitable title would be protected from the time of that transaction. See RESTATEMENT (THIRD) 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?*, 85 Baylor L. Rev. 153, 229-30 (2013) (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.

²² 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.).

²³ See *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.)

²⁴ See *Matter of Haber Oil*, 12 F.3d 426, 436 (5th Cir. 1994).

²⁵ See *Marathon Machine 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).

does not override title transferred to a bona fide purchaser,²⁶ it can attach to the proceeds of that sale held by the defendant.²⁷ A monetary judgment offers none of these benefits and cannot therefore be considered an adequate alternative.

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 in conflict, will override judicial restrictions.²⁸ On the other hand, courts assume a statutory remedy adopts the elements of the comparable judicial remedy if its provisions do not say otherwise.²⁹ 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.³⁰ This provision does not elaborate on the guidelines for its application, and one assumes court-made rules would apply. However, this constructive trust remedies a breach of a fiduciary duty, and the three-element rule would not restrict its intended application.

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."³¹ 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. 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

²⁶ See *MBank-Waco N.A. v. L. & J., Inc.*, 754 S.W.2d 245, 252 (Tex.App.-Waco 1988, writ denied).

²⁷ *Meadows v. Bierschwale*, 516 S.W.2d 125, 133 (Tex. 1974).

²⁸ 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, 510-511 (Tex. 2013) (holding that the statutory 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).

²⁹ "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." *Morton*, 512 S.W.3d at 511.

³⁰ See Tex. Prop. Code § 114.008(a)(9).

³¹ Tex. Fam. Code § 9.011(b).

party” at the time of the decree.³² 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. 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.

Section 356.655 of the Texas Estates Code creates a cause of action for anyone who has an interest in an estate. It expressly allows these interested parties to seek the return of estate property purchased by a representative of the estate.³³ Although not labeled a constructive trust, this order performs that remedy’s essential function – it restores specific property to the estate.

The Texas Civil Practice and Remedies Code allows a constructive trust in a civil case to enforce laws against civil racketeering related to trafficking of persons.³⁴ Also related to the civil enforcement of criminal laws, several Texas statutes impose a constructive trust to implement the so-called slayer rule. 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 member. 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.” 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 accomplice in “willfully bringing about the death of the insured.” Section 1103.152 allows a contingent beneficiary not implicated in the killing to take the life insurance proceeds. If no such beneficiary exists, § 1103.152(c) allows the nearest relative of the insured to recover the benefits. These parties can thereby use a constructive trust to divest the guilty beneficiary of legal title and to turn over any benefits received.³⁵

III. The Three-Element Rule

A. KCM Financial

Unlike these statutory constructive trust remedies, the court-made

³² 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. The statute’s controlling text, however, makes this argument unnecessary.

³³ See Tex. Est. Code § 356.655(b)(3).

³⁴ See Tex. Civ. Prac. & Rem. Code § 140.004(a).

³⁵ See *Bounds*, 560 S.W.2d at 928. Although the supreme court approved use of a constructive trust, it reversed the judgment for other reasons. See *id.* at 929-30.

remedy depends on judicial rules and restrictions. The most troublesome restriction on the constructive trust is the three-element rule mentioned in the introduction. 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.³⁶ 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.

Until very recently, a full elaboration to the three-element rule had appeared only in Texas courts of appeals' opinions.³⁷ The rule's restrictiveness was presumably secured by insisting on proof of each element in every case.³⁸ In 2014, the Supreme Court of Texas also appeared to adopt the three-element rule. In *KCM Financial*, it stated that:

[t]hree 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.³⁹

The court noted that “[i]n weighing the imposition of a constructive trust, a court will identify whether a wrongful taking has occurred.”⁴⁰ Although implied by the first element, this language emphasized the requirement that the property have been wrongfully acquired.

³⁶ The older statute-of-frauds cases appear to supply support for this first element, but the supreme has recently both repeated this element and ignored it.

³⁷ See *In Re Hayward*, 480 S.W.3d 48, 52 (Tex.App.--Fort Worth 2015, no pet.) (citing *KCM Fin.*); *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.-Tyler 2009, no pet.); *In re Lemons*, 281 S.W.3d 643, 647 (Tex.App.-Tyler 2009, no pet.); *Hahn v. Love*, 321 S.W.3d 517, 533 (Tex.App.-Houston [1st Dist.] 2009, pet. denied); *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); and *Mowbray v. Avery*, 76 S.W.3d 663, 681 n.27 (Tex.App.-Corpus Christi 2002, pet. denied).

³⁸ 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).

³⁹ *KCM Financial LLC v. Bradshaw*, 457 S.W.3d 70, 87 (Tex. 2014).

⁴⁰ See *id.*

In 1960, the parents of Betty Lou Bradshaw sold the Mitchell Ranch and reserved for her one-half of any royalty interest that might be obtained in a future lease of the minerals.⁴¹ 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.⁴² Steadfast Financial, which later became KCM Financial,⁴³ ultimately took ownership of the Ranch's surface and mineral estate.

As the mineral estate owner, Steadfast possessed the executive power to enter and amend oil and gas leases, subject to Bradshaw's overriding one-half interest in any royalty.⁴⁴ In exercising this power, Steadfast entered a mineral lease with Range Productions in which it reserved a one-eighth royalty interest.⁴⁵ As a result, Bradshaw received the minimum one-sixteenth royalty interest reserved for her by her parents. Steadfast obtained the remaining one-sixteenth royalty interest, which it assigned to a group referred to as the "Royalty Owners" by the supreme court.⁴⁶

Although Steadfast had to share the royalty interest with Bradshaw, it did not have to share any bonuses.⁴⁷ Bradshaw's dissatisfaction with the lease arose because, she alleged, Steadfast failed to demand the then-market rate -- a one-fourth royalty interest.⁴⁸ 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.⁴⁹ Bradshaw sued Steadfast, the Royalty Owners, and others. 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.⁵⁰

The trial court entered summary judgments on behalf of Steadfast and the Royalty Owners. In its decision, the supreme court upheld the summary judgment for the Royalty Owners, but reversed the judgment entered in favor of Steadfast. The court concluded that Steadfast owed Bradshaw a duty of utmost good faith and fair dealing, even though it did not have to put

⁴¹ *See id.* at 75.

⁴² *Id.* at 75 n. 2.

⁴³ *Id.* at 77 n. 4.

⁴⁴ *See id.* at 75.

⁴⁵ *See id.* at 78.

⁴⁶ *See id.*

⁴⁷ *See id.* at 74.

⁴⁸ *See id.* at 78.

⁴⁹ *See id.*

⁵⁰ *See id.* at 86-87.

her interests ahead of its own. The court therefore affirmed the court of appeals' remand of Bradshaw's breach-of-trust claim for trial.⁵¹

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). 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. This logic suggested to her that the Royalty Owners should hold their one-sixteenth interest as constructive trustees for her benefit. Adding their one-sixteenth royalty interest to her one-sixteenth royalty interest gave her the one-eighth interest she would have obtained if Steadfast had not engaged in self-dealing.⁵²

The supreme court denied her request for a constructive trust on the interest held by the Royalty Owners. It did so because she failed to trace property taken from her to the royalties and royalty interest obtained by the Royalty Owners.⁵³ In the original transfer of the Mitchell Ranch, her parents reserved for her one half of any royalty interest obtained in a mineral lease. They sold the other one-half interest along with the surface estate. Her constructive-trust claim thus targeted property that she never owned.⁵⁴ The one-sixteenth royalty interest held by the Royalty Owners was therefore not traceable to, or derived from, any interest in royalties that she obtained through her parents' reservation. Her constructive-trust claim therefore failed as a matter of law because she could not satisfy the tracing requirement of the rule.

One might be confused by the possibilities raised by the supreme 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.

The supreme court's recitation of the three-element rule was *obiter dictum* at least to the extent of the first two elements.⁵⁵ However, statements

⁵¹ See *id.* at 85.

⁵² See *id.* at 88.

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ The court makes clear that a constructive trust cannot be imposed on property that is not traceable to property taken from the plaintiff. Therefore, Steadfast's breach of its

of law made by the highest state court cannot be dismissed merely because they were not essential to its holding.⁵⁶ One can, however, note that the supreme court did not evaluate the first element of the rule and that it only recognized that element as “generally” required.

B. *Kinsel v. Lindsey*

In May of 2017, the supreme court issued its opinion in *Kinsel v. Lindsey*.⁵⁷ 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.⁵⁸ This absence required reversal of the constructive trust in light of the elements “generally required” under the three-element rule. The supreme court responded by noting that this argument “views the permissible bases for a constructive trust too narrowly.”⁵⁹ 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.’”⁶⁰

[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*.⁶¹

Lesey Kinsel had created an inter vivos trust as part of her estate plan and had deeded to this trust the 60% interest she owned in her ranch.⁶² Prior

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.

⁵⁶ *See Elledge v. Friberg-Cooper Water Supply Corp.*, 240 S.W.3d 869 (Tex. 2007) (per curiam). In that 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. The court responded that “[o]ur 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.* at 870.

⁵⁷ ____ S.W.3d ____, 60 Tex. Sup. Ct. J. 1070, 2017 WL 2324392 (May 26, 2017).

⁵⁸ *See id.* at 1081.

⁵⁹ *See id.*

⁶⁰ *Id.*

⁶¹ *See id.* at 1081 (emphasis added).

⁶² *See id.* at 1071.

to its fourth and fifth amendments and to the sale of the ranch, the trust apportioned Lesey's 60% interest to named step-children and step-grandchildren.⁶³ The residuary clause of the trust left everything else to her niece Jane Lindsey,⁶⁴ who was also a co-trustee.

In 2005 at the age of 92, Lesey moved from Beaumont to an assisted-living facility that was located in Fort Worth where Jane and her brother Bob lived.⁶⁵ 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.⁶⁶ 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 her 60% interest.⁶⁷ Shortly before she died in 2008, Lesey executed a fifth amendment to her trust that removed all mention of the ranch.⁶⁸ When she died, therefore, the trust by its terms passed the \$3 million in sales proceeds to Jane as the residual beneficiary.

Prior to the amendments and the sale of the ranch, the step-children and step-grandchildren would have received Lesey's interest in the ranch. After her death, they had no right to receive any portion of the proceeds from the sale of Lesey's interest. 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. The plaintiffs asserted claims for tortious interference with their inheritance, statutory and common law fraud, and conspiracy.⁶⁹

The jury concluded that Jane had unduly influenced Lesey, who lacked the mental capacity to understand the consequences of her actions. Jane had used this influence to convince her to modify the trust and to sell the ranch.⁷⁰ Based on the jury's findings, the trial judge entered judgment for damages, attorneys' fees, and a constructive trust on the sales proceeds held by the trust.⁷¹ The supreme court upheld the jury finding that Lesey lacked capacity to understand the nature of her acts⁷² and upheld the trial

⁶³ *See id.* Many of these individuals also shared ownership of the remaining 40% interest in the ranch.

⁶⁴ *See id.*

⁶⁵ *See id.*

⁶⁶ *See id.* at 1072.

⁶⁷ *See id.* at 1072.

⁶⁸ *See id.* at 1072-73.

⁶⁹ *See id.* at 1074.

⁷⁰ *See id.* at 1075.

⁷¹ *See id.*

⁷² *See id.* at 1077.

court's issuance of a constructive trust.⁷³ 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.

First, the supreme 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.⁷⁴ 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.⁷⁵ The court rejected the plaintiffs' argument that it had approved a tortious interference with inheritance claim in its *Pope* decision.⁷⁶ That case, the court noted, involved one of the many instances in which a court, acting in equity, could impose a constructive trust on property obtained through "unconscientious acts."⁷⁷

In upholding the jury's undue-influence and lack-of-capacity findings in *Kinsel*, the supreme court recognized that these justified setting aside the fourth and fifth amendments to the trust and the deed of sale. However, the court noted that undue influence was not an independent tort cause of action.⁷⁸ The undue-influence finding did provide grounds for setting aside Lesey's otherwise valid acts and documents. 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."⁷⁹ The undue-influence finding thereby revealed how the defendants would be unjustly enriched by retention of the proceeds from a now-invalid sale.

In approving the constructive trust in *Kinsel*, the supreme court necessarily broadened the justifications for a constructive trust. No effort was made to characterize the undue-influence contention as a breach of trust

⁷³ See *id.* at 1081.

⁷⁴ See *id.* at 1077.

⁷⁵ See *id.* at 1080.

⁷⁶ See *id.* at 1078. In *Anderson v. Archer*, 490 S.W.3d 175, 177-78 (Tex.App.-Austin 2016, pet. granted), 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 not accepted this cause in *Pope*.

⁷⁷ See *id.* at 1079. Because a tortious interference claim could not support the constructive trust in *Pope*, one can fairly ask what cause of action did. 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.

⁷⁸ See *id.* at 1078 n.3.

⁷⁹ *Id.* at 1082.

or fraud. The supreme court conceded that in *KCM Financial* it did recognize that breach of trust or fraud were “generally” necessary for a constructive trust.⁸⁰ Nevertheless, it concluded that it had approved a constructive trust as a remedy for a much wider array of wrongs.⁸¹

However, the court did not describe the cause of action that supported the constructive trust in *Kinsel* or in *Pope*. In *Kinsel*, the court affirmed the court of appeals’ rejection of the plaintiffs’ fraud, tortious interference with inheritance, and conspiracy causes of action. In addition, it rejected the plaintiffs’ contention that they were due damages under an undue-influence cause of action.⁸² And, even after rejecting these four possible causes of action, the supreme court approved the trial court’s judicial remedy of constructive trust. 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.⁸³

IV. The Function of Wrongdoing

A. Altering Statutory Outcomes

The Restatement (Third) notes that the courts of equity created the constructive trust to remedy a breach of trust, but it concludes that this remedy no longer requires a fiduciary or confidential relationship.⁸⁴ In his treatise, 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.”⁸⁵ Limiting the remedy to violations of fiduciary duty or fraud is illogical, he argues, because a “constructive trust is based on property, not wrongs.”⁸⁶

Professor Dobbs also recognizes an exception. This exception applies in cases in which a “court cannot find unjust enrichment at all unless there is wrongdoing.”⁸⁷ For example, he discusses the statute of frauds, which requires an agreement to convey land to be in writing. If innocent parties

⁸⁰ See *id.* at 1081.

⁸¹ *Id.* (quoting *Pope v. Garrett*, 211 S.W.2d 559, 560 (Tex. 1948)).

⁸² See *id.*

⁸³ See *id.* at 1081. The supreme 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. RESTATEMENT (THIRD)

RESTITUTION AND UNJUST ENRICHMENT § 1 (Am. Law Inst. 2011). “A person who is unjustly enriched at the expense of another is subject to liability in restitution.”

⁸⁴ See *id.* at cmt. b. “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.*

⁸⁵ See DOBBS, *supra* note 14, at § 4.3(2), 597.

⁸⁶ *Id.*

⁸⁷ *Id.* at 598.

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.⁸⁸ 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. In this instance, a constructive trust does not endanger land titles; it prevents the manipulation of the statutory requirements. That constructive trust also does not establish a precedent allowing other courts leeway to disregard the statute. This reasoning leads to the conclusion that wrongdoing is a prerequisite for holding that enrichment conferred in part by statute is unjust.

In *Holmes v. Kent*⁸⁹, the supreme court made clear that, absent wrongdoing, outcomes resulting from the operation of statutes cannot unjustly enrich an unintended beneficiary. 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.⁹⁰ Prior to her retirement as a teacher, McWhorter chose to have her retirement benefits paid through an optional annuity plan. When she retired, McWhorter received reduced annuity benefits so that her then-husband, Holmes, would receive annuity benefits after her death.⁹¹ These benefits would continue during the remainder of his life.

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. This attempt ran afoul of statutory requirements for changing a beneficiary.⁹² 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.⁹³

She subsequently obtained a divorce from Holmes and submitted her decree to the Teacher Retirement System (TRS). That decree included language divesting him of any rights to her retirement benefits.⁹⁴ 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.⁹⁵

⁸⁸ *Id.* at 599.

⁸⁹ 221 S.W.3d 622 (Tex. 2007) (per curiam).

⁹⁰ *See id.* at 623.

⁹¹ *See id.*

⁹² *See id.* at 626.

⁹³ *See id.*

⁹⁴ *See id.*

⁹⁵ *See id.* at 627.

TRS did, however, supply her with the language that, if included in the decree, would suffice. However, McWhorter never altered the decree and never obtained Holmes' notarized consent to a change of his beneficiary status.⁹⁶ That status therefore existed when she died.

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.⁹⁷ The supreme court reversed and rendered judgment for Holmes.⁹⁸ It held that McWhorter's failure to abide by the statutory requirements prevented courts from enforcing her intent.⁹⁹ 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."¹⁰⁰

Kent could not use a constructive trust to excuse his mother's noncompliance without undermining the relevant statutes.¹⁰¹ In *Holmes*, McWhorter's own delay or negligence left the ex-husband with benefits she clearly intended to withdraw. The supreme 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.¹⁰² As a result of her failure, she allowed the relevant statutes to enrich Holmes. Because this enrichment occurred as a result of statutory directives, however, it could not be unjust. Having no wrongdoing to cure, judicial intervention based solely on a court's general notions of equity would disrupt legislative requirements and policies.¹⁰³

B. Breach of Trust or Fraud

In statute-of-frauds cases, the 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. Needing some wrongdoing to justify the plaintiff's credulity, the most obvious would be

⁹⁶ *See id.*

⁹⁷ *See id.* at 623.

⁹⁸ *See id.* at 629.

⁹⁹ *See id.* at 628.

¹⁰⁰ *Id.* at 629.

¹⁰¹ "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.

¹⁰² "McWhorter never took any of the relatively simple steps TRS explained to change or revoke the beneficiary designation." *Id.* at 628.

¹⁰³ *See id.*

deceit. These forms of wrongdoing were used therefore 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.¹⁰⁴

One begins by recognizing that a court cannot give effect to an otherwise invalid oral contract merely because the plaintiff was careless.¹⁰⁵ Because benefits received as a result of the intended operation of a statute do not alone constitute unjust enrichment,¹⁰⁶ the refusal to carry out one's unenforceable promise would not justify its enforcement.¹⁰⁷ Furthermore, the operation of the statute cannot be ignored because of an uncalled-for reliance on another party.¹⁰⁸ 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.¹⁰⁹

In *Faville v. Robinson*,¹¹⁰ a daughter conveyed land to her mother based on the mother's oral promise to re-convey that property by devise in her will. The mother subsequently repudiated that promise, and the daughter sued seeking to have a trust impressed on the land.¹¹¹ The supreme court held that the statute of frauds did not apply because breach of such a promise

¹⁰⁴ The Texas Supreme Court rejected such an interpretation in *Kinsel*, 60 Tex. Sup. Ct. J. at 1081.

¹⁰⁵ See *Holmes*, 221 S.W.3d at 628.

¹⁰⁶ See *id.* at 629.

¹⁰⁷ 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. He promised that, after refurbishing the house, he would sell the house and lot to her for an agreed-upon price. Conflict arose concerning the price, and the petitioner refused to convey. The supreme 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. Neither could be enforced because they violated the statute of frauds. See *id.* at 815. The court approved the court of civil appeals' rejection of a constructive trust because "the record contains no proof of misrepresentation, fraud or concealment to support" that remedy. *Id.*

¹⁰⁸ "[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 supreme 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).

¹⁰⁹ See *Ginther v. Taub*, 675 S.W.2d 724, 728 (Tex. 1984). In *Ginther*, the defendant's refusal to perform his oral promise re-convey mineral interests was also tainted by the breach of a fiduciary relationship another party who had induced the conveyance.

¹¹⁰ 227 S.W.2d 938 (Tex.1921).

¹¹¹ See *id.*

was “necessarily a fraud.”¹¹² 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.¹¹³ Because the grantee’s promise induced the conveyance, she could not be allowed to keep the benefit gained by her breach of faith. An early commentator noted that this use of a constructive trust does not violate the statute of frauds because it returns the land to the grantor as a means not of specific performance but to restore the status quo.¹¹⁴

The supreme court supplemented this fraud explanation by describing a similar situation in *Mills v. Gray*¹¹⁵ as a breach of a confidential relationship. In *Mills*, a married couple contemplating divorce conveyed land without written restriction to the wife’s son. She contended he had orally agreed to re-convey this property after the marital problems were resolved.¹¹⁶ When the son refused to re-convey, the reconciled couple sought a constructive trust. However, the trial court excluded evidence of the oral agreement between the mother and son.¹¹⁷

This case arose after the legislature amended the Texas Trust Act to require a writing for express trusts concerning title to land.¹¹⁸ But the 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. The supreme court reversed the trial court’s exclusion of 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.¹¹⁹

The significance of a confidential family relationship established by *Mills* provides an explanation of the decision in *Faville*. In *Faville*, the supreme court appeared to find fraud without evidence of an intentional misrepresentation. The supreme court in *Mills* noted however that a confidential relationship can arise between a mother and a son (or a mother

¹¹² See *id.* The court did not require proof that the mother never intended to perform her promise. In other words, the court did not require proof of fraudulent inducement.

¹¹³ See *Gray v. Mills*, 206 S.W.2d 278, 282 (Tex.Civ.App.-Fort Worth 1947) *aff’d* *Mills v. Gray*, 210 S.W.2d 985 (Tex. 1948).

¹¹⁴ See James Barr Ames, *Constructive Trusts Based Upon the Breach of An Express Oral Trust of Land*, 20 Harv. L. Rev. 549, 551 (1907).

¹¹⁵ 210 S.W.2d 985 (Tex. 1948).

¹¹⁶ See *id.* at 987-88.

¹¹⁷ See *id.* at 987.

¹¹⁸ 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 § 112.004.

¹¹⁹ *Id.* at 989.

and a daughter, as in *Faville*), and its breach would be a “constructive fraud” that would give rise to a constructive trust.¹²⁰

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.¹²¹ The majority responded by finding that the pleadings and proof established a joint adventure among the parties, which imposed on each the highest duty to the others.¹²² Having violated his duty, equity applied to force the defendant to “disgorge and to divide his gains” in accordance with the oral agreement.¹²³

Justice Smedley, in dissent, contended that a fiduciary relationship does not arise from an oral agreement to enter a joint venture. It arises instead from a preexisting relationship of confidence that was not present in this case.¹²⁴ 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.”¹²⁵ He reasoned that the Texas Trust Act’s statute of frauds allows a constructive trust only in three instances: (1) a case for restitution, (2) proof of fraud, or (3) proof of a violation of an existing fiduciary relationship.¹²⁶ 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.¹²⁷ The plaintiffs in *Fitz-Gerald* sought property they never paid for or owned and therefore were not seeking restitution. He also concluded that evidence of a defendant’s breach of an oral promise did not establish fraud.¹²⁸

The supreme court in *Consolidated Gas & Equipment Co. of American v. Thompson* seemed to retreat from its ruling in *Fitz-Gerald*. 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.¹²⁹ The jury found

¹²⁰ *See id.*

¹²¹ *See* 237 S.W.2d 256, 261 (Tex. 1951).

¹²² *See id.* at 264.

¹²³ *See id.*

¹²⁴ *See id.* at 272 (Smedley, J., dissenting).

¹²⁵ *See id.* at 273 (Smedley, J., dissenting).

¹²⁶ *See id.* at 271 (Smedley, J., dissenting).

¹²⁷ *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.

¹²⁸ *See id.* at 270-71 (Smedley, J., dissenting).

¹²⁹ 405 S.W.2d 333, 337 (Tex.1966).

the plaintiffs were induced to obtain a lease and to assign it to the defendant by his promise to give them the overriding royalty. Thereafter, he refused to perform.¹³⁰ The supreme court nevertheless reversed the lower courts' constructive trust on the assigned lease. Unlike the facts in *Faville* or *Mills*, these parties were businessmen who had no familial or other confidential relationship with one another prior to the oral agreement. 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.¹³¹

In *Tyra v. Woodson*, the court more directly questioned its holding in *Fitz-Gerald*. In *Tyra*, the parties orally agreed to enter a joint venture to acquire oil and gas interests.¹³² The plaintiffs had requested a written agreement, but the defendants refused to enter one.¹³³ The 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.¹³⁴ 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.¹³⁵

In *Ginther v. Taub*, the supreme 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."¹³⁶ 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.¹³⁷ Taub

¹³⁰ *See id.* at 336.

¹³¹ *Id.*

¹³² 495 S.W.2d 211 (Tex. 1973).

¹³³ *See id.* at 213. 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.

¹³⁴ *See id.*

¹³⁵ *See id.*

¹³⁶ *See* 675 S.W.2d 724, 728 (Tex. 1984).

¹³⁷ *See id.* at 725.

knowingly benefitted from this breach of an attorney's fiduciary obligations and from the attorney's fraud. The supreme court held that "the jury findings of fraud by MacNaughton to benefit Taub support the imposition of the constructive trust remedy" against Taub.¹³⁸

Taub contended that he was an innocent beneficiary and had not participated in MacNaughton's wrongdoing. 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."¹³⁹ The court went to note that in *Pope v. Garrett*, it "imposed a constructive trust on totally innocent beneficiaries of the wrongful act."¹⁴⁰ Taub, who knew he had obtained a benefit because of MacNaughton's misrepresentations, deserved no better treatment than a wholly innocent beneficiary of wrongdoing.¹⁴¹

C. Violent Conduct

In its 1984 discussion of the *Pope* decision in *Ginther*, the supreme court placed no emphasis on the absence of a breach of trust or fraud in that 1948 decision.¹⁴² And, as noted above, the *Pope* decision was cited as authority for the supreme court's recent refusal to restrict a constructive trust to these two forms of wrongdoing.¹⁴³ The decision in *Pope*¹⁴⁴ has special significance because in *Kinsel* the court concluded that the constructive trust in the earlier decision was not based on a tortious-interference-with-inheritance cause of action.¹⁴⁵ In addition, the court approved that constructive trust as a remedy for violent conduct.¹⁴⁶

This first point opens the door for the argument that the constructive trust in *Pope* remedied what was necessarily a claim for specific restitution

¹³⁸ *Id.* at 727.

¹³⁹ *Id.* at 728 (citing *Pope v. Garrett*, 211 S.W.2d 559, 562 (Tex. 1948)).

¹⁴⁰ *Id.*

¹⁴¹ *See id.*

¹⁴² *See id.* The court also cites *Meadows v. Bierschwale*, 516 SW.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.*

¹⁴³ *See Kinsel*, 60 Tex. Sup. Ct. J. at 1081.

¹⁴⁴ *See Pope*, 211 S.W.2d at 562.

¹⁴⁵ *See Kinsel*, 60 Tex. Sup. Ct. J. at 1078-79.

¹⁴⁶ 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 1081.

to prevent unjust enrichment.¹⁴⁷ The supreme court in *Kinsel* denied that the cause of action for tortious interference with inheritance supported liability in *Pope*.¹⁴⁸ This ruling seemingly leaves only an unjust-enrichment cause of action supporting that constructive trust.¹⁴⁹

In *Pope*, Ms. Garrett sued to obtain a constructive trust on the assets of the estate of her friend, Ms. Simons. That estate had passed to the heirs of Simons through the descent and distribution statute. Prior to her death, Simons had 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.¹⁵⁰ 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."¹⁵¹ Shortly thereafter she lapsed into a coma and died without signing the will.¹⁵²

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.¹⁵³ The court of civil appeals concluded that only this portion could be subjected to a constructive trust.¹⁵⁴ The 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.¹⁵⁵ The supreme court stated that "[t]he policy against unjust enrichment argues in favor of the judgment rendered by the district court [imposing the constructive trust on all heirs] rather than that of the Court of Civil Appeals [imposing the constructive trust only on the participating heirs]."¹⁵⁶ The court also cited with approval Dean Roscoe Pound's observation of what he called "the

¹⁴⁷ See *id.* ("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.)
Id.

¹⁴⁸ See *Kinsel*, 60 Tex. Sup. Ct. J. at 1080.

¹⁴⁹ "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.

¹⁵⁰ See *id.* at 562.

¹⁵¹ *Id.* at 560.

¹⁵² See *id.*

¹⁵³ See *id.* at 559.

¹⁵⁴ *Id.*

¹⁵⁵ See *id.* at 562.

¹⁵⁶ See *id.*

typical case of constructive trust, namely, specific restitution of a received benefit in order to prevent unjust enrichment."¹⁵⁷

The 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.”¹⁵⁸ The court recognized the danger posed by this remedy and noted that it must be used with caution so that it not “defeat the purposes of the statute of wills, the statute of descent and distribution, or the statute of frauds.”¹⁵⁹ 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.”¹⁶⁰

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. Neither the statute of wills nor the statute of descent and distribution was designed to protect an outcome accomplished through violence.¹⁶¹ And it was this violence that caused the unjust enrichment of all of the heirs.¹⁶²

Although different in outcome, the supreme court’s decisions in *Holmes* and *Pope* are two applications of the same principle. In *Holmes*, the court denied a constructive trust because the defendant’s enrichment resulted from the decedent’s failure to comply with statutory requirements. 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. 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. In this hypothetical, even the overwhelming evidence of Simons’ intent could not prove the heirs’ unjust enrichment.

Another supreme court decision dealing with violent conduct presents an even starker inconsistency with the first element of the rule. In *Bounds v. Caudle*¹⁶³, 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

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *See id.*

¹⁶⁰ *See id.* at 561.

¹⁶¹ *See id.*

¹⁶² *See id.* at 562.

¹⁶³ 560 S.W.2d 925 (Tex.1977).

"intentionally and wrongfully caused" her death.¹⁶⁴ Although the supreme 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.¹⁶⁵

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.¹⁶⁶ However, the husband entered a plea bargain in his criminal case and was allowed to plead *nolo contendere* to a charge of negligent homicide.¹⁶⁷ The supreme 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.¹⁶⁸

Powerful equitable, moral, and policy reasons justify using a constructive trust to implement this slayer rule.¹⁶⁹ That rule prevents the unjust enrichment of a killer who would otherwise benefit under the will. 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.¹⁷⁰ This constructive trust thereby prevents what would otherwise be the unjust enrichment of the slayer.¹⁷¹

V. Innocent but Unjustly Enriched

¹⁶⁴ *See id.*

¹⁶⁵ *See id.* at 928. *See also*, Thompson v. Mayes, 707 S.W.2d 951, 955 (Tex.Civ.App.--Eastland 1986, writ ref'd n.r.e.)

¹⁶⁶ *See also supra* note 35. This provision excuses this forfeiture from the constitutional and statutory bars on convictions that "work corruption of blood."

¹⁶⁷ *See Bounds*, 560 S.W.2d at 926.

¹⁶⁸ *See id.* at 928. The supreme 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.*

¹⁶⁹ *See* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 45 cmt. c. (Am. Law Inst. 2011).

¹⁷⁰ "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." *Bounds*, 560 S.W.2d at 928. 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.

¹⁷¹ 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.

The decisions discussed in Part IV show why a finding of unjust enrichment requires wrongdoing when a statutory directive applies. In the following cases, the supreme court and one court of appeals approve a constructive trust without regard to the defendant's wrongful acquisition of the property.¹⁷² These decisions thus impliedly reject a universal requirement of wrongdoing for a constructive trust.

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

Texas law indisputably allows a monetary award as *general* restitution to prevent unjust enrichment caused by mistaken payments. In the *Bryan* case,¹⁷³ 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. [Citations omitted.] The purpose of such restitution is to prevent unconscionable loss to the party paying out the funds and unjust enrichment to the party receiving payment.¹⁷⁴

In that case, Citizens National Bank mistakenly paid a check over a stop payment order.¹⁷⁵ It sued seeking return of these funds through a monetary award.¹⁷⁶ The judgment for general restitution was reversed, however, and the supreme court remanded the case for trial on the issue of whether the drawer of the check was liable to the payee.¹⁷⁷ The court held

¹⁷² See also 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).

¹⁷³ *Bryan v. Citizens Nat. Bank in Abilene*, 628 S.W.2d 761 (Tex. 1982).

¹⁷⁴ *Id.* at 763.

¹⁷⁵ See *id.* at 761.

¹⁷⁶ See *id.* at 762.

¹⁷⁷ See *id.* at 764.

that, though the law had been unclear, the bank retained its cause of action to seek restitution. It could not however recover on that cause of action in a manner that conflicts with applicable Uniform Commercial Code sections.¹⁷⁸ 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.

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.¹⁷⁹ As the cases discussed below strongly indicate, the supreme court is very likely to support a constructive trust for recovery of mistaken payments. It has, in fact, expressly stated its approval of that result in the *Zundell* case.¹⁸⁰

It should be noted, however, that an innocent recipient of mistaken payments has defenses that are not available against claims based on wrongdoing. For example, the supreme court notes in *Bryan* that a defendant without knowledge of the mistake may have materially changed position based on the mistaken payment. Satisfaction of that defense or of others can defeat the plaintiff's unjust-enrichment claim and thereby prevent restitution of any sort.¹⁸¹ In addition, a claim of unjust enrichment for mistaken payments cannot exist when in conflict with the terms of a valid and enforceable contract.¹⁸²

¹⁷⁸ *See id.*

¹⁷⁹ 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 ends." Andrew Kull, *James Barr and the Early Modern History of Unjust Enrichment*, 25 *Oxford J. Legal Stud.* 297, 302-03 (2005).

¹⁸⁰ *See Zundell*, 10 S.W. at 694.

¹⁸¹ Equitable reasons can justify retention of property obtained at the plaintiff's expense. 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. Center of Arlington*, 83 S.W.3d 274, 278 (Tex.App-Fort Worth 2002, no pet.); because he has changed his position because of 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) 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.

¹⁸² *Southwestern Elec. Power Co. v. Burlington N. Railroad Co.*, 966 S.W.2d 467, 470 (Tex. 1998). The power company had entered a long-term contract with the railroad for

In the introduction to this article, a hypothetical was described in which a misdirected online transfer was traced to identifiable property. This hypothetical is drawn from the decision by the San Antonio Court of Appeals in *Castano v. Wells Fargo Bank*.¹⁸³ 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. This automated computer transaction was completed solely by use of an account number. 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.¹⁸⁴

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 he got this matter "cleared up."¹⁸⁵ 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. A few days later, he withdrew this money as another cashier's check and placed it in his safety deposit box.¹⁸⁶

After Gonzales discovered the mistaken transfers, she notified Wells Fargo. Its officials sought return of the two cashier's checks that represented Gonzales' money, but Castano refused to return them.¹⁸⁷ At that point, Gonzales sued Wells Fargo, which then interpleaded Castano. 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' account.¹⁸⁸ 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.

the transportation of coal. The railroad began making unforeseen profits because of the reduction of its costs, and the contract contained a provision for adjusting payments. The jury found that this provision was not violated but that the railroad was nevertheless unjustly enriched. The supreme court noted that the jury's finding of compliance with the contract foreclosed its finding of unjust enrichment. *See id.* at 469-70.

¹⁸³ 82 S.W.3d 40 (Tex.App.-San Antonio 2002, no pet.)

¹⁸⁴ *See id.* at 42.

¹⁸⁵ *See id.*

¹⁸⁶ *See id.*

¹⁸⁷ *See id.*

¹⁸⁸ *See id.*

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."¹⁸⁹ 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."¹⁹⁰ 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.¹⁹¹ 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. He clearly did not, as the three-element rule requires, wrongfully acquire the money because of a breach of trust or fraud.¹⁹²

Even as an innocent recipient, however, Castano had no right to the property. He also had no defense to the contention that he would be unjustly enriched if allowed to retain Gonzales' money.¹⁹³ In addition, it was indisputable that the cashier's checks were the product of Gonzales' mistaken transfer. The plaintiffs thereby satisfied the unjust-enrichment and the tracing requirements, and the absence of wrongdoing was simply irrelevant.¹⁹⁴

Even though the facts did not satisfy the three-element rule, the court of appeals was undoubtedly correct in upholding the constructive trust. 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.¹⁹⁵ During a suit in trial court for a monetary award, Texas law bars any provisional injunctive relief to freeze a defendant's

¹⁸⁹ *Id.* at 43 (citing *Ginther v. Taub*, 675 S.W.2d 724, 728 (Tex. 1984)) (emphasis added).

¹⁹⁰ *Id.* (citing *Ginther v. Taub*, 675 S.W.2d 724, 725-27 (Tex. 1984)) (emphasis added).

This statement appears to describe the first two elements of the three-element rule.

¹⁹¹ *Id.*

¹⁹² *See supra* at note 41.

¹⁹³ Texas law clearly supported recovery of a monetary award under these facts. *See Bryan*, 628 S.W.2d at 763. The only question was whether Gonzales could obtain a constructive trust instead of a money judgment.

¹⁹⁴ *See supra* Part I.

¹⁹⁵ 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 be available when a final monetary award was issued.

assets.¹⁹⁶ Therefore, if denied equitable relief, the plaintiffs could not use a temporary injunction to freeze the cashier's checks. Castano would thereby have such leverage that he could obtain a settlement allowing him to keep part of Gonzales' money. The trial court and court of appeals avoided the injustice of such an alternative by imposing the constructive trust.

In this day of online banking and payment systems, many residents of the state could be a keyboard click away from Gonzales' 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 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, that court has expressed support for this use of a constructive trust. Well over a century ago in *Zundell v. Gess*, the supreme court stated its approval of a constructive trust remedy and of specific restitution for return of mistaken payments.¹⁹⁷ 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.¹⁹⁸ In discussing this remedy, the supreme 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*. 2 Pom. Eq. Jur. § 1047. 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.¹⁹⁹

¹⁹⁶ Neither a Texas nor a federal court will issue provisional injunctive orders to protect the enforcement of a common law claim for damages. In both court systems, however, a trial court can do so when the final remedy is primarily equitable, such as a constructive trust. See *Nowak v. Los Patios Investors, Ltd.*, 898 S.W.2d 9, 10 n.2 (Tex.App.-San Antonio 1995, no pet.).

¹⁹⁷ See *Zundell v. Gess*, 73 Tex. 144, 10 S.W. 693 (1889).

¹⁹⁸ See *id.*

¹⁹⁹ *Id.* at 694 (emphasis added).

The bank had erroneously reduced Swiss francs owed Gess to dollars and forwarded to him \$1,073 instead of the correct amount, which was \$389. Gess allegedly used that money and other funds to purchase the home upon which the bank sought to impose a constructive trust. The supreme court held that the bank had failed to satisfy its burden of tracing the money to this land.²⁰⁰ Because of this failure, it could not enjoy the remedy of a constructive trust on Gess' land. Had it satisfied this obligation, it presumably could have obtained a constructive trust even though its own mistake caused Gess' unearned benefit.²⁰¹

Without requiring wrongdoing, the supreme court has also approved the constructive trust as a remedy for enforcing contractual wills.²⁰² A court typically impresses this constructive trust on some part of the decedent's estate as probated under the breaching will.²⁰³ In *Wiemers*, George and Ida Wiemers executed a joint will in 1951 that would ultimately devise their 125-acre homestead to their son Wesley.²⁰⁴ George died in 1960, and Ida probated the joint will.²⁰⁵ In 1972, she executed another will that conflicted with the 1951 will. Upon her death, the beneficiaries probated the 1972 will,²⁰⁶ but the wife and children of Wesley sued for a constructive trust on the homestead.²⁰⁷ The supreme 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.²⁰⁸

One might argue that Ida's 1972 will represented a breach of trust, but the supreme court did not rely on or even discuss such wrongdoing.²⁰⁹ Furthermore, the court did not conclude that Ida was guilty of fraud.²¹⁰ Instead, it granted the constructive trust to avoid unjust enrichment. It

²⁰⁰ *See id.* at 695.

²⁰¹ *See id.* at 694.

²⁰² *See Wiemers v. Wiemers*, 683 S.W.2d 355, 357 (Tex. 1984); *Novak v. Stevens*, 596 S.W.2d 848, 853 (Tex. 1980).

²⁰³ *See Novak*, 596 S.W.2d at 853; *Coffman v. Woods*, 696 S.W.2d 386, 388 (Tex.App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.).

²⁰⁴ *See Wiemers*, 683 S.W.2d at 355.

²⁰⁵ *See id.* at 356.

²⁰⁶ *See id.*

²⁰⁷ *See id.* at 357.

²⁰⁸ *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. Estates Code* § 254.004(a)(2).

²⁰⁹ Ida, now deceased, was not being sued for breach of contract, and the remedy of specific performance was not appropriate.

²¹⁰ *See Wiemers*, 683 S.W.2d at 357; *Novak*, 596 S.W.2d at 853.

concluded that “[i]t 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.”²¹¹

In *McGoodwin v. McGoodwin*, the supreme court dealt with a property settlement agreement that required a wife to convey to the husband her interests in a 22-acre tract in exchange for the husband's payment of \$22,500.²¹² The husband failed to pay, and the trial court imposed a vendor's lien on the property and ordered it sold at foreclosure.²¹³ The supreme 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.²¹⁴ 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. This vendor's lien "arose by implication, as a natural equity creating a constructive trust in the vendee."²¹⁵ 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 of defendant's property while a constructive trust orders that property's transfer.²¹⁶

In another family law decision, the 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.²¹⁷ The supreme court held this confinement was for a debt in violation of the Texas Constitution, and he therefore could not be incarcerated for contempt of court.²¹⁸ 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.

We have held that when a trial court finds that the particular property at issue currently exists and awards that property as

²¹¹ *Wiemers*, 683 S.W.2d at 357 (quoting *Weidner v. Crowther*, 301 S.W.2d 621, 624 (Tex. 1957)).

²¹² 671 S.W.2d 880, 881 (Tex. 1984).

²¹³ *See id.*

²¹⁴ *See id.* at 882.

²¹⁵ *Id.* (quoting *White, Smith & Baldwin v. Downs*, 40 Tex. 225, 231 (Tex. 1846)). *See also*, *Magallanez v. Magallanez*, 911 S.W.2d 91, 95 (Tex.App.-El Paso 1995, no pet.).

²¹⁶ RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT, § 56, cmt. b. (Am. Law Inst. 2011).

²¹⁷ *See In Re Henry*, 154 S.W.3d 594, 595 (Tex. 2005).

²¹⁸ *See id.* at 597.

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 existed.²¹⁹

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.²²⁰

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. In both cases, the defaulting owner later acquired the surface and mineral estate of the property free of the preexisting mineral interests. In *Cecil v. Dollar*²²¹ Cecil executed a deed of trust binding a 640-acre tract of land to secure a note owing Newman.²²² A year later, Cecil conveyed the land to Blount in a deed that reserved one-half of the mineral interest. Blount also assumed payment of the Newman note.²²³ Thereafter, Blount conveyed the land to Dollar, less Cecil's reserved one-half mineral interest, and Dollar assumed liability to pay the Newman note.²²⁴ 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.²²⁵

The facts showed that Dollar had sufficient funds to pay the Newman note, but decided to default and purchase the property at foreclosure.²²⁶ The supreme court held that "it would be unconscionable to allow [Dollar] to acquire the Cecil interest and thus unjustly enrich himself."²²⁷ 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

²¹⁹ *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.

²²⁰ The order Henry disobeyed also required payment of child support, which was not a debt. 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 Henry*, 154 S.W.3d at 598.

²²¹ 218 S.W.2d 448 (Tex. 1949).

²²² *See id.* at 449.

²²³ *See id.*

²²⁴ *See id.*

²²⁵ *See id.*

²²⁶ *See id.* at 449-50.

²²⁷ *Id.* at 450.

assert it for his exclusive benefit.”²²⁸ However, in explaining its decision, the court distinguished its earlier decision in *Talley v. Howsley*²²⁹ by observing that the defaulting cotenant in that case, Will McKeichen, had not been shown to have been enriched by his default.²³⁰ In contrast, Dollar had intentionally defaulted and immediately benefitted from his own default. This evidence supported the conclusion that his purpose was to enrich himself unjustly at the expense of the mineral-interest holder.

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. When McKeichen defaulted, Davis foreclosed and purchased the land at foreclosure free of any claims to the mineral interest. After one year, Davis sold part of the land without any reservation of minerals to Will McKeichen.²³¹ The supreme 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.²³² 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.²³³ It concluded that Dollar’s purchase at foreclosure relieved Cecil’s obligation under the debt, but Dollar “acquired no better equitable title than he had prior to the sale.”²³⁴ Therefore, even though Dollar acquired legal title to the minerals, he held that interest as a constructive trustee for Cecil.

In a breach of contract case, the supreme court has also approved a constructive trust imposed on a specific fund in a Mexican bank. This constructive trust required the defendant to deposit the fund in the registry of a Texas trial court.²³⁵ The parties had in Texas agreed to jointly purchase a Mexican lottery ticket, and it turned out to be a winner. The defendant denied the agreement, however, and caused her son to collect the money and

²²⁸ *Id.*

²²⁹ 176 S.W.2d 158 (Tex. 1943).

²³⁰ *See Cecil*, 218 S.W.2d at 451.

²³¹ *See Talley*, 176 S.W.2d at 159.

²³² *See id.* at 160.

²³³ The 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 Cecil*, 218 S.W.2d at 450. This rule was applied however because Dollar used foreclosure to unjustly enrich himself at the expense of his cotenants. *See Dickason v. Mathews*, 335 S.W.2d 658, 660-61 (Tex.App.-Amarillo 1960, writ ref’d n.r.e.).

²³⁴ *See id.* at 451.

²³⁵ *See Castilleja v. Camero*, 414 S.W.2d 431, 433 (Tex. 1967).

deposit it in a bank in Mexico.²³⁶ The Texas trial court ordered the defendant to deposit the plaintiff's portion in the registry of the court, and the supreme court upheld this order as well as the court of civil appeals' characterization of that order as a constructive trust.²³⁷ 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.²³⁸

The Texas Supreme Court in *KCM Financial* cited its earlier decision in *Meadows v. Bierschwale*²³⁹ for the proposition that "[a] constructive trust is an equitable, court-created remedy designed to prevent unjust enrichment."²⁴⁰ This quotation was also included in the court's more recent decision in *Kinsel*.²⁴¹ In *Meadows*, Bierschwale hired Meadows to broker the sale of his apartment complex, and Meadows found a buyer in Herbert Oakes.²⁴² 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.²⁴³ The notes, however, proved to be worthless.²⁴⁴

In the meantime, Oakes sold the apartment complex to Goldman, a bona fide purchaser, who also paid with promissory notes (the Goldman notes).²⁴⁵ In his suit to rescind the sale to Oakes based on fraud, Bierschwale obtained a constructive trust on the Goldman notes.²⁴⁶ This fraud had placed Oakes in a position to benefit from the Goldman notes, which were the traceable product of the sale of the apartment complex. Meadows intervened in this suit seeking both a monetary award against Oakes and a portion of Bierschwale's constructive trust on the Goldman notes. Although it allowed Meadows a monetary award, the court of civil

²³⁶ See *Castilleja v. Camero*, 414 S.W.2d 424, 425 (Tex. 1967). This companion case held that the contract was not illegal and that the plaintiff had ownership of half of the winnings.

²³⁷ See *Castilleja*, 414 S.W.2d at 434.

²³⁸ See *id.* at 433. Although this order was described as a constructive trust, it could have been described as a temporary injunction. An injunctive order of this sort could operate as specific performance although the property involved was not unique.

²³⁹ 516 S.W.2d 125 (Tex. 1974).

²⁴⁰ *KCM Financial*, 457 S.W.3d at 87.

²⁴¹ See *Kinsel*, 60 Tex. Sup. Ct. J. at 1080.

²⁴² See *Meadows*, 516 S.W.2d at 127.

²⁴³ See *id.* at 127-28.

²⁴⁴ See *id.* at 128.

²⁴⁵ See *id.* at 127.

²⁴⁶ See *id.*

appeals denied him any part of the constructive trust obtained by Bierschwale.²⁴⁷

In reversing this part of the court of civil appeals' decision, the supreme court held that Bierschwale must proportionately share the benefits of the constructive trust with Meadows.²⁴⁸ The court concluded that Bierschwale could not enjoy this equitable remedy while denying Meadows the same equity.²⁴⁹ In explaining this 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."²⁵⁰ In reality, Bierschwale gained a substantial profit from the Goldman notes and excluding Meadows would further enrich him.²⁵¹ The supreme court thus used a constructive trust to prevent the unjust enrichment of a party even though he was innocent of wrongdoing.²⁵²

VI. 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.²⁵³ The court's holding in *Kinsel* makes clear that today a broader array of wrongful conduct can justify the remedy. Indeed, as noted above, the supreme court's past decisions establish a far broader basis for the remedy and one that directly conflicts with the rule. One concern is that the *Kinsel* decision does not explicitly approve a constructive trust on property acquired without wrongdoing. The court's older decisions support that conclusion, but the continued existence of the three-element rule raises a problem. The failure to repudiate the rule leaves courts, lawyers, and clients trapped by an express

²⁴⁷ *See id.* at 128.

²⁴⁸ *See id.* at 131.

²⁴⁹ *See id.* at 132.

²⁵⁰ *Id.* at 131 (emphasis added).

²⁵¹ *See id.* at 132.

²⁵² 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." 675 S.W.2d 724, 728 (Tex. 1984).

²⁵³ The supreme court's statement of the rule as "generally required" in the *KCM Financial* decision prevents one from disregarding the rule. *See supra* notes 39-40. The San Antonio Court of Appeals did however find a way around it. *See Castano*, 82 S.W.3d at 43. One might say that it circumvented the rule in a good cause, but surely that good cause argues for an authoritative disavowal.

but controversial condition on an important remedy. That problem would be alleviated in part if the supreme court directly changed the rule to recognize that a constructive trust has a broad function of “redressing wrong or unjust enrichment.”²⁵⁴

B. The Superfluous Second Element

In *Kinsel*, the supreme court upheld the constructive trust used to prevent those defendants from enjoying the benefit of property acquired through their undue influence.²⁵⁵ This holding reduced the confusion caused by the rule’s first element.²⁵⁶ This constructive trust affected only the funds acquired through undue influence²⁵⁷ and captured in a specific trust fund.²⁵⁸ It thereby upheld the constructive trust based on tracing and unjust enrichment, while at least expanding the forms of wrongdoing that can support unjust enrichment.

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. 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.²⁵⁹ By proving the defendant obtained specific property by breaching his duty, the plaintiff would satisfy the first and the third²⁶⁰ elements of the rule. That same proof will also establish the defendant’s unjust enrichment. How could allowing such a guilty defendant to retain property belonging to the plaintiff not be unjust?

²⁵⁴ See *Kinsel*, 60 Tex. Sup. Ct. J. at 1081 (quoting *Meadows v. Bierschwale*, 516 S.W.2d 125, 131 (Tex. 1974)).

²⁵⁵ See *id.* at 1082.

²⁵⁶ See *id.* at 1081.

²⁵⁷ See *id.* at 1074.

²⁵⁸ The plaintiffs originally agreed to allow Jane to use trust proceeds to pay her attorneys’ fees, but they subsequently sought to have her replenish those funds when they fell below the original \$3 million. See *id.* at 1080.

²⁵⁹ 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. *Graham Mortgage Corp. v. Hall*, 307 S.W.3d 472, 479 (Tex.App-Dallas 2010, no pet.).

²⁶⁰ 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 *Longview Energy Co.*, 60 Tex. Sup. Ct. J. at 1202.

For example, the Lindseys' undue influence in *Kinsel* allowed them to capture the \$3 million in sales proceeds from Lesey's 60% interest in the ranch. By using undue influence to divert Lesey's ranch interest to themselves at the expense of the step-children and step-grandchildren, they were unjustly enriched. In other words, the wrongful conduct that allowed them to acquire another's property established unjust enrichment without any additional proof required. 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. It recognizes that the finding of unjust enrichment can be proved either through wrongdoing or by showing the wrongfulness of the defendant's retention of the property at issue.²⁶¹ 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.²⁶² The three-element rule's insistence on wrongdoing in every case serves no policy or purpose and confuses the matter as well.²⁶³

C. Unjust-Enrichment Cause of Action

In the *Kinsel* decision, the supreme court rejected a strict application of the first element of the rule because it viewed the “permissible bases for a constructive trust too narrowly.”²⁶⁴ The court also appeared to recognize that a constructive trust primarily operates to prevent unjust enrichment however proved. It indicated as much when it stated that a “constructive trust is an equitable court-created remedy designed to prevent unjust enrichment”²⁶⁵ and that it returns property to “the one who is truly and

²⁶¹ RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 55(1) (Am. Law Inst. 2011).

²⁶² *See id.* at cmt. f.

²⁶³ 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.

²⁶⁴ *See Kinsel*, 60 Tex. Sup. Ct. J. at 1081. Even though the facts in *Kinsel* did not satisfy the rule's first element, the supreme court noted that “the justification for a constructive trust is not so constrained.” *See id.*

²⁶⁵ *See id.* (citing *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 87 (Tex. 2015)).

equitably entitled to it.”²⁶⁶ This opinion thus seems to accept much broader equitable justifications for the constructive trust, even though its ruling was based on undue influence.²⁶⁷

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 few causes of action.²⁶⁸ This restriction is significant because, as an equitable remedy, the constructive trust requires proof of an established cause of action.²⁶⁹ However, the plaintiff need only prove the elements of a cause of action justifying specific restitution before enjoying a constructive trust. In *Sherer v. Sherer*, the Texarkana Court of Appeals described the constructive trust as “merely a remedy used to grant relief on the underlying cause of action.”²⁷⁰ It went on to identify some of those causes of action as ones for breach of fiduciary duty, conversion, or unjust enrichment.²⁷¹

Because of the history and terminology of equity, laymen assume courts can just “do equity” without bothering with a recognized cause of

²⁶⁶ *See id.* (citing *Pope v. Garrett*, 211 S.W.2d 559, 560 (Tex. 1948)).

²⁶⁷ *See id.* at 1082.

²⁶⁸ 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, or between partners. *See Meyer v. Cathey*, 167 S.W.3d 327, 330 (Tex. 2005); *Gregan v. Kelly*, 355 S.W.3d 223, 227 (Tex.App.-Houston [14th 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 a false, material representation knowingly made with the intent to induce reliance, which does induce reliance and thereby injures the victim. *See Zorrilla v. AYP CO 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).

²⁶⁹ *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).

²⁷⁰ 393 S.W.3d 480, 491 (Tex.App.-Texarkana 2013, pet. denied). *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.).

²⁷¹ *See Sherer*, 393 S.W.3d at 491.

action. 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. For example, the paradigmatic equitable remedy is the injunction, but a permanent injunction cannot be granted without a finding of liability.²⁷² Even a temporary injunction requires proof of established elements, the first of which is a cause of action.²⁷³

Although the supreme 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.²⁷⁴ In *HECI Exploration Co. v. Neel*²⁷⁵, royalty owners sued HECI, their lessee, to recover a portion of the judgment it recovered against another operator for harm to the common pool. Their claim against that other operator was time-barred, and they contended that HECI had an obligation to notify them of its suit.²⁷⁶ One of their causes of action was one for unjust enrichment. The supreme court held that because HECI could not have asserted a claim on their behalf, it could not be unjustly enriched at their expense.²⁷⁷ The court did acknowledge that “[w]e have recognized that, in some circumstances, a royalty owner has a cause of action against its lessee based on unjust enrichment.”²⁷⁸ However, HECI had acquired no property in its settlement that belonged to the Neels.

Having previously recognized the unjust-enrichment cause of action, the supreme court need not go through the formal process of creating one. The court discussed the factors to be considered in creating a cause of action

²⁷² 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)). 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.

²⁷³ “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.” *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

²⁷⁴ See *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 685 (Tex. 2000).

²⁷⁵ 982 S.W.2d 881 (Tex. 1990).

²⁷⁶ See *id.* at 884.

²⁷⁷ See *id.* at 891-92. Only a plaintiff with standing can assert a claim for unjust enrichment, and that standing requires proof that the defendant’s benefit was acquired either from or at the expense of the plaintiff.

²⁷⁸ *Id.* at 891. The supreme court also recognized that “[u]njust enrichment was the basis for recovery in *Gavenda v. Strata Energy, Inc.*, 705 S.W.2d 690, 693 (Tex.1986).” *Id.*

for tortious interference with an inheritance in its *Kinsel* decision.²⁷⁹ One important reason it cited for not needing a new cause of action was the availability of adequate alternatives.²⁸⁰ It concluded that there was “no compelling reason to consider a previously unrecognized tort if the constructive trust proved to be an adequate remedy.”²⁸¹ There are, however, no alternate remedies that would adequately replace a constructive trust when the defendant would otherwise be unjustly enriched by the plaintiff’s property.²⁸²

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 this benefit would unjustly enrich the defendant.²⁸³ 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.”²⁸⁴ 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.²⁸⁵ 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.²⁸⁶

VII. Conclusion

²⁷⁹ See *Kinsel*, 60 Tex. Sup. Ct. J. at 1079 n.6.

²⁸⁰ See *id.* at 1079.

²⁸¹ *Id.*

²⁸² See *id.*

²⁸³ See RESTATEMENT (THIRD) 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).

²⁸⁴ See RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 55 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.*

²⁸⁵ See *id.* at § 55.

²⁸⁶ See *Longview Energy Co. v. Huff*, __ S.W.3d __, 60 Tex. Sup. Ct. J. 1195, 1202, 2017 WL 2492004 (June 9, 2017) (plaintiffs failed to satisfy their tracing obligation by failing to provide evidence showing which oil & gas leases were acquired as a result of the defendants’ alleged breach of fiduciary duty); *KCM Financial*, *supra* text accompanying notes 56-57 (plaintiff failed to show that the targeted interests were ever owned by her).

The three-element rule does not reflect Texas Supreme Court decisions and, when taken seriously, disserves the public's interest in protecting property rights. For the reasons discussed, it should be disavowed by Texas courts. The supreme 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.²⁸⁷ However, it can no longer be considered a rule of exclusion – that is, it does not describe the only instances in which a constructive trust is justified. Even as a rule of inclusion, its many exceptions make the rule misleading.

Instead of these three elements, the supreme 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 the benefit on the defendant, his enrichment cannot be deemed unjust²⁸⁸ unless he used wrongdoing to bring about this result.²⁸⁹ Under these circumstances only would proof of wrongdoing be necessary to satisfy the requirement of unjust enrichment.

This modified rule more accurately describes the 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 a stated rule that frustrates both of those purposes.

²⁸⁷ See *Kinsel*, 60 Tex. Sup. Ct. J. at 1081.

²⁸⁸ See *Holmes*, 221 S.W.3d at 629.

²⁸⁹ See *Pope*, 211 S.W.2d at 562.