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REDISCOVERING THE RESULTING TRUST: MODERN MANEUVERS FOR A DATED DOCTRINE?

by

MALCOLM L. MORRIS*

I. INTRODUCTION

Usually thought of as only a remedial measure,¹ the resulting trust may now be ready to take on an expanded role. Although not considered devolutionary vehicles per se, resulting trusts can direct the passage of title, and are therefore potentially useful estate planning tools. To serve in this capacity, the applicable principles used to raise resulting trusts must be introduced at the time of the transaction and not resorted to as an afterthought at some later date. Using resulting trusts in such a manner is arguably inconsistent with the theory supporting their existence. This article suggests, however, that the courts — perhaps unwittingly — have opened the door for this practice. Whether the benefits accruing from permitting such activity outweigh the yet unseen dangers is an issue worthy of consideration.

II. THE RESULTING TRUST

A. Generally

The resulting trust doctrine is not novel. Resulting trusts have long been recognized by the English courts,² and nineteenth century cases in New York³ and Illinois⁴ evidence that the doctrine is firmly rooted in American jurisprudence. The belief expressed in Botsford v. Burr¹ by the then New York Chancery Court that, absent a contrary intention, the actual owner of property should enjoy its use even though title is in the name of another, is basically the same tenet applied by today's courts⁵ when erecting resulting trusts.

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¹See, e.g., Wootton v. Melton, 631 P.2d 1337, 1341 (Oklahoma Ct. App. 1981), where the court said, "Both constructive trusts and resulting trusts are remedial in the sense that they are devices to prevent wrongful taking or unlawful holding of property." See also, Cummings v. Tinkle, 91 Nev. 548, 539 P.2d 1213 (1975).

²See, e.g., Cascoigne v. Thering, 1 Vern. 366 (1685).

³Boyd v. M'Lean, 1 Johns Ch. 582 (1812).

⁴Smith v. Sackett, 5 Gilm. 534 (1849).

⁵2 Johns Ch. 405 (1817).

crucial element both then and now is the parties' intentions incident to the situation. A better understanding of the doctrine and the vital role intention plays should emerge by comparing and contrasting the resulting trust to other trusts.

The separation of legal ownership from beneficial enjoyment is the fundamental concept common to all trusts. It is the manner in which the division of these interests occur that creates the two distinct categories of express and implied trusts. Resulting trusts are members of the latter group.

Express trusts are created when the separation of ownership from use originates from either express terms or some direct and positive action which may be evidenced by writings or words. Implied trusts are said not to arise by direction or agreement between the parties, but by operation of law. Implied trusts can be further categorized into two classes — constructive trusts and resulting trusts. The former is usually erected when there has been some wrongdoing (such as a breach of a fiduciary duty) in an effort to prevent the titleholder from either becoming unjustly enriched or profiting from his wrong. Resulting trusts, however, arise when the facts demand the conclusion that the titleholder was never intended to possess a beneficial interest. Although sometimes confused, constructive and resulting trusts are clearly distinguishable: the latter not requiring an element of wrongdoing in order to be erected, but only an inferred intention that beneficial enjoyment was not meant to pass to the titleholder.

Although properly placed in different categories, in one major respect express trusts and resulting trusts are similar: to be created, both depend upon

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1See generally, 1 G. BOGERT, TRUSTS & TRUSTEES § 1 (2d ed. 1965); and 1 A. SCOTT, THE LAW OF TRUSTS, § 1 (3d ed. 1967).
8See discussion at 4 J. POMEROY, EQUITY JURISPRUDENCE § 1030, n.5 (5th ed. 1941).
10Kerber v. Rowe, 348 Mo. 1125, 156 S.W.2d 925 (1941); McDermott v. Sher, 59 N.M. 142, 280 P.2d 860 (1955); Peshy v. Luther, 199 Mo. 35, 91 S.W. 668 (1905).
the transferor’s intention. They differ sharply, however, in the role intention plays in their respective inceptions. Consider the function of intention with each type.

As its name suggests, the express trust is created by an express intention to see separate ownership and use aspects of the property pass to those designated. It is a positive intention flowing from some agreement or other action between the parties that causes the division of interest to occur and the trust to exist. Such an intention may be manifested in various ways. The courts have long since eliminated the need for any particular form of words necessary to create a trust if a writing makes its existence clear and have declared that implication can supply some details not explicitly stated. Moreover, when personality is involved the courts have permitted the requisite intention to be shown merely by evaluating circumstances incident to the transfer and have generally discarded the strict formalities of yesteryear. Clearly, the expressed intention to create the trust and not how that expression is manifested is the basic ingredient essential to the formation of the express trust.

Resulting trusts are equally dependent on the element of intention for their existence. Its role, however, is the distinguishing feature of this grouping. Unlike the express trust situation, an intention to actually create a resulting trust is not necessary for its existence. Instead of a positive intention to create a trust (as if found in the express trust setting), the resulting trust depends on the demonstration of absence of an intention to vest beneficial enjoyment in the

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titleholder. It may be said that the resulting trust is predicated upon a "negative intention" showing not what was meant, but rather what was not meant. The essence of the trust lies in the presumption that the transferor (or supplier of the consideration) intended to retain rather than convey the beneficial interest. The key point is that the resulting trust is not established by an intention to create a trust, but is raised by operation of law based on a presumption that despite appearances to the contrary, a trust relationship was intended. This application of intention distinguishes the resulting trust from other trusts.

In contrast to the creation of express trusts, the prevailing view is that no agreement or other specific statements can directly establish a resulting trust. The trust springs from the action itself, the actual event by which title is taken in the name of someone not intended to have beneficial interest. This follows logically from the definition that resulting trusts arise when "the legal estate in property is disposed of, conveyed or transferred, but the intent appears, or is inferred from the terms of the disposition or from the accompanying facts and circumstances, that the beneficial interest is not to go or be enjoyed with legal title." Notice that the intent necessary to raise the trust is built by the court from the "appearances" and "inferences" flowing from the facts and is independent of inter-party agreements. This is not to say that such agreements may not be used to help build the necessary negative intention. It should be understood, however, that when so used these items play only an evidentiary role and are not themselves the source of the creation of the trust. If the evidence proves an intention to establish a trust, then the action of the parties rather than operation of law creates the trust. In such a situation an express and not a resulting trust would be said to exist. But it is not always easy to identify the role such agreements play, or at least are perceived to be playing. Thus, although a trust must be one type or the other, it is sometimes difficult to ascertain which type it actually is.


[See Howell v. Fiore, 210 S. 2d 253 (Fla. 1968) where the court, citing Wadlington v. Edwards, 92 So.2d 629 (Fla. 1957) said, "In the creation of a resulting trust it is essential that the parties actually intend to create the trust relationship but fail to execute documents or establish adequate evidence of the intent." 210 So. 2d at 256. See also, Jirka v. Prior, 196 Neb. 416, 243 N.W.2d 754 (1976) where the court noted that resulting trusts are "presumed always to have been contemplated by the parties . . . ." 196 Neb. at 423, 243 N.W.2d at 759.


[Walrath v. Roberts, 12 F.2d 443, 445 (9th Cir. 1925) (emphasis added).]


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B. Specifically

From a purely legal standpoint the resulting trust doctrine causes some concern. To permit the courts to strip away or deny beneficial enjoyment to the ostensible legal owner of property is not entirely free of objection. The fact that resulting trusts are creatures of equity raised to promote the inherent fairness of insuring “that he who pays for the property enjoys it,” seems to have silenced most of the critics. There can be little doubt that a court of equity can go beyond bare naked title to determine the actual rights and respective interests of the parties.30

Despite their generally universal acceptance,31 resulting trusts are not impressed over every transfer that vests title in the name of one who did not furnish the consideration for the property. Such a practice would make all gifts nugatory. There is no formula or bright line test which when applied will prescribe the raising of a resulting trust.32 A sui generis approach, judging the facts and circumstances of each case on its own merits, is needed to determine whether or not the trust should be erected.33 The court must be satisfied that the evidence warrants the raising of the trust.

Since the transferor’s intention is always the ultimate issue of dispute in resulting trust cases, one would suspect that some simple method for determining it would have evolved over the last few centuries. Unfortunately, the judiciary’s longstanding wrestling match with this problem has not met with great success. This failing can be better appreciated in light of the extremely difficult task sought to be accomplished. Ascertaining an intention without the direct assistance of the person whose mind is being read is not an easy feat.34 Developing guidelines capable of uncovering a “true” or “real” intention that will be permitted to override a palpable intention gleaned from a deed or other instrument is an onerous chore. Although certain presumptions exist — such

31See Boyd v. M’Lean, 1 Johns Ch. 582, 586 (1815) where the court referred to the doctrine as “a well-known and universally admitted rule in equity.”
33Jones v. Gore, 141 Cal. App. 2d 667, 297 P.2d 474 (1956); Harris v. McIntyre, 118 Ill. 275, 8 N.E. 182 (1886); Davis v. Downer, 210 Mass. 573, 97 N.E. 90 (1912); In re Fitzpatrick’s Estate, 17 N.Y.S.2d 280 (1940).
34Although many resulting trust cases arise after the death of one of the parties to the original transaction, this is not always the case. Sometimes the suit is instituted by one party to the original transaction against the other initial participant. Also, the suit can be initiated by a creditor of one of the parties. In the two latter situations at least the relevant parties are available for examination.
as the presumption of a gift or a transfer from a husband to wife or parent to child — they can and sometimes do prove to be more of a hindrance than a help.

At the heart of the problem is the inability to satisfactorily define that quantum of evidence which will show proper intent to permit a resulting trust to be raised. Courts propound that the requisite proof must be "clear and convincing" or "clear, convincing, unequivocal and unmistakable." Despite its impressive ring the skeptics can show this standard to be hollow. Surely what is "unmistakable" to one may easily be tainted with doubt to another. One wonders whether any true degree of certainty is achievable with such a subjective standard. Despite contrary beliefs, sufficiency of evidence remains a judgment call often affected primarily by the skill of counsel in making the case rather than the application of artificial standards. The following case comparison illustrates the point.

In Lord v. Reed, Reed owned property which was paid for by the plaintiff's deceased husband, William. The plaintiff maintained, and the trial court agreed, that defendant Reed was "a woman of unusual physical charms, and by reason of her arts, artifices and blandishments exercised great power over" the decedent. The plaintiff asserted that Reed was thus able to entice William to supply funds and use them for property placed in her name. Relying on testimony of uninterested witnesses concerning statements made by the decedent after the purchase of the property, the court concluded that the decedent had willingly acted to benefit Reed, and that regardless of how reprehensible the relationship might have been, there was no cause to raise a resulting trust. Seemingly implicit in the decision is a determination that the record could not justify rebutting the transferor's intention to make a gift as evidenced by the deed in Reed's name.

In Kane v. Johnson, Johnson obtained title to property by operation of law as a surviving joint tenant. The deceased tenant had been both Kane's wife and Johnson's cousin. She had originally purchased the property when she was unmarried. The property was paid for with her own funds and money

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38Crawford v. Hurst, 307 Ill. 243, 138 N.E. 620 (1923), and O'Brien v. O'Brien, 256 Mass. 308, 152 N.E. 80 (1926). Recently, in Mims v. Mims, 305 N.C. 41, 286 S.E.2d 779 (1982), the presumption of gift was expanded to include all interspousal transfers, and not just those from a husband to his wife.


40Carr v. Yokohama Specie Bank, Ltd., 200 F.2d 251 (9th Cir. 1953); In re Estate of Zengerle, 2 Ill. App. 3d 98, 276 N.E.2d 128 (1971); Schmitz v. Schmitz, 234 A.D. 73, 254 N.Y.S. 109 (1931).


42254 Ill. 350, 98 N.E. 553 (1912).

43Id. at 354.

44397 Ill. 112, 73 N.E.2d 321 (1947).
she had borrowed by executing a note and mortgage individually. By stressing
that Johnson contributed nothing toward the purchase of the property the
plaintiff succeeded in having a resulting trust raised. In doing so the court
noted that the express intent of the deed indicating that Johnson had an interest
in the property must give way to the equitable principle that protects the
beneficially interested party. The court accepted the master's finding of fact
and seemingly did not reach the issue of a gift by deed since it was not raised
by the defendant.

Are there sufficient differences between these two situations to warrant
the raising of the trust in one instance but not the other? To some Ms. Reed's
position may appear to have been weaker than Mr. Johnson's, yet she prevail-
ed and he did not. Did the testimony of the uninterested witnesses turn the
tide for Reed, or was it the fact that Johnson was only a joint tenant and not
the outright owner that hurt his cause? The purpose of these questions is not
to generate specific responses as much as it is to further illustrate that a stan-
dard of proof such as "clear and convincing" is too imprecise to offer signifi-
cant assistance in solving the resulting trust issue.

Reed and Kane offer more than a mere demonstration of the malleability
of the "clear and convincing" standard. Each provides additional insight into
other aspects of the overall dilemma posed by the search for the controlling
negative intention. Reed illustrates the admissibility of post-transfer evidence
in resulting trust cases. Kane introduces the particular problems associated with
joint tenancy. Further analysis should put the final strokes on the resulting
trust picture and help focus on the potentially new role the resulting trust may
be able to play.

It has long been settled that parol evidence can be used to establish a
resulting trust. It is equally as well accepted that written statements can be
given similar effect. Moreover, it is immaterial whether this evidence addresses
matters occurring before or after the transaction in question. In Reed, it was
the decedent's post-purchase oral statements to the effect that he had acted
on behalf of Reed that seemed to deliver the telling blow. However, a fine line
should be clearly drawn to distinguish the purpose for which the evidence is
sought to be used. Insofar as maintaining the efficacy of the resulting trust
document is concerned, evidence can only be used to prove the negative inten-
tion necessary to raise the trust. This is because a resulting trust can only arise
by operation of law. If evidence is presented to establish that there was an ex-
plcit intention to have a trust created, then it would seem that an express trust
is being proved. This is true even though the effective provision of the express

* Babcock v. Wyman, 60 U.S. 289 (1856); Millard v. Hathaway, 27 Cal. 119 (1865); Katzing v. Wiegand,
286 Ill. 646, 122 N.E. 97 (1919); Peabody v. Tarbell, 56 Mass. (2 Cush.) 226 (1848); Le Fevre v. Reliable

trust would be identical to those brought into being by a resulting trust.

Unfortunately, it is often difficult to distinguish on which side of the line a particular set of facts falls. This in turn forces one to seriously question whether the basis for the distinction, although perhaps theoretically sound, can be given practical significance. The gray zone between the pure express and pure resulting trust covers a greater area than some might like to accept. The situation found in *Collins v. Link* is representative of cases lying in this twilight area.

In *Collins*, two unmarried men living together purchased a residence but placed title solely in the name of the defendant. Three primary reasons for doing this were presented. First, they feared co-ownership and co-occupancy by two unmarried men would not have been permitted within the subdivision in which the property was situated. Second, the seller had expressed a desire only to sell to a family, something which they could not be considered. Third, the defendant owned the residence in which the two had lived before the purchase and it was thought it would be easier to obtain financing if title was placed in the name of an individual already owning property. At all times the parties represented to their agent that they were buying the house together. The two men had each made contributions to a joint bank account. The earnest money for the property was taken from this account, as were all subsequent monthly installment payments. Based upon these facts, and other similarly disposed evidence, the trial court found that there was "an 'intention shared by the parties' that the 'title to the . . . property be taken in the name of the defendant alone for the benefit of both.' " It concluded that the parties intended that they each possess a one-half ownership interest. Since complete title was in the defendant's name, the court ruled that he held the plaintiff's interest in trust for him. Without explicitly saying so, the court in effect found an agreement between the parties and used it as the basis for erecting the resulting trust.

The appellate court affirmed the trial court's decision. In so doing it dismissed the appellant-defendant's contention that the trial court's finding of an agreement between the parties was inconsistent with the raising of a resulting trust. Although the court conceded that resulting trusts cannot arise from agreements to specifically create them, it believed this would not prevent other types of agreements from giving rise to resulting trusts. Thus it is possible to have an agreement that merely recites that certain acts be done, which when performed give rise to a situation wherein a resulting trust can be raised. Such an agreement requiring certain action or inaction can, as the court sug-

\[^{44}\text{Perhaps the more decisive inquiry is whether the courts are always willing to make the distinction. In some instances, it seems the ends have been used to justify the means.}\]

\[^{45}\text{562 S.W.2d 131 (Mo. 1978).}\]

\[^{46}\text{Id. at 134.}\]
gested, be seen as constituting no more than a fact or circumstance which may be used to demonstrate the inference necessary to raise a resulting trust.

The paradox is eminently clear. A direct agreement creates an express trust, but seemingly only if the agreement actually attempts to create the trust. If the agreement merely speaks to the performance or non-performance of certain activities, then it does not create an express trust but serves only as evidence that can be used to establish a resulting trust. Moreover, this would hold true regardless of the activities covered in the agreement. If this distinction is controlling, then a resulting trust could conceivably arise from an agreement made incident to a transfer from A to B stating that although B holds title, (s)he will never commit an act that would in any way derogate from A’s pre-agreement ownership position. Surely all the indicia of an express trust are present, but arguably under the Collins approach it is a resulting trust that would be raised.

Does this mean that the pivotal issue is how the parties frame the agreement rather than its underlying substance? One is reluctant to accept such a position, but the ingredients necessary to successfully support it are present. Moreover, the position does not derogate from the theoretical base of the resulting trust doctrine to the extent that the agreement is used to show a negative intention not to have ownership pass rather than a positive expression of directing ownership. Could it be that the truly critical factor is not what is being looked at, but instead the perspective from which the observation is being made?

C. The Joint Tenancy Setting

By returning to the Kane situation the complications peculiar to erecting trusts over transfers of property into joint tenancy can be more fully explored. Initially of interest is the problem stemming from the fact that creating a joint estate presumes an immediate gift. This presumption in turn leads to the question of whether resulting trust principles are properly applicable to gratuitous conveyances. The answer will expose another aspect of resulting trusts and demonstrate the broader applicability of the doctrine itself.

As to the first issue, the inherent nature of the joint estate itself generates the problem. A joint tenant is considered to own an undivided interest in the entire estate and as such has a present ownership right in the joint property. This fact has led the courts to conclude that the creation of a joint tenancy presumes an intention of a gift to the donee-tenant. Although Kane is authority for the proposition that a resulting trust can be impressed over a joint estate to defeat the rights of a surviving tenant, the “gift” issue was never raised in the case. Similarly in Mauricau v. Haugen a resulting trust was erected

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*387 Ill. 86, 56 N.E.2d 367 (1944).*

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over a joint estate only after the "gift" issue was eliminated.51

When the presumption of a gift by dint of the joint tenancy is present, the ability to raise a resulting trust has been questioned. More specifically, it has been flatly posited that the modern day rule52 is that resulting trusts cannot be raised over gratuitous conveyances.53 Thus, to the extent that the creation of a joint tenancy speaks to the whole transaction, there is no room to rebut the presumption of a gift; the argument for a resulting trust cannot be made. Conversely, there are those who do not eliminate the gratuitous conveyance as a potential resulting trust candidate.54 But to succeed, the trust proponent must overcome the presumption of a gift by providing clear and convincing evidence to the contrary.55 A common instance in which the climate is right for making a successful argument of this type involves joint bank accounts, in what can be termed the joint tenancy for convenience situation. In re Estate of Denler56 is illustrative of the fact pattern which will give rise to a favorable resulting trust decision.

In Denler, the decedent deposited monies into certificates of deposit in joint tenancy with her daughter, Eileen. The deposits were made after the decedent had informed Eileen that she would have to care for the decedent because of the decedent’s ill health. A joint checking account was also opened. The transactions took place in 1969 and 1970. The decedent maintained control of the passbooks and wrote all of the checks up until she suffered a stroke in 1975. Additionally, in 1973, through the use of a straw person, she deeded her residence into joint tenancy with Eileen, but continued to live in the house.

After their mother suffered a severe stroke in 1975, Eileen and her brother, Warren, decided to put the decedent’s financial affairs in order. Eileen transferred money from one of the certificates of deposit into a joint account with Warren and herself as co-tenants. Shortly before her death the decedent had executed a new will leaving her estate equally to her two children. She had also

51In Mauricau, id., a wife discovered that her attorney had executed a deed that placed her individually-owned property into joint tenancy with her husband. To assuage her dissatisfaction with respect to the joint estate, a separate document declaring that her husband held title merely as a trustee was executed. The instrument expressly stated that the husband was not to have any real title or interest in the property and that he was in effect a joint tenant in name's sake only. In raising a resulting trust in favor of the wife against the husband’s creditors, the court specifically overruled the chancery master’s conclusion that a transfer from a wife to her husband presumes a gift. With respect to the written agreement between the parties, the court held that whereas such a writing could not create the trust, it could be used to acknowledge or admit that a resulting trust was created at the time of transfer. Id.

52The time reference is necessary as the law developed from the directly opposite position viz., gratuitous transfers carried the inference of a retained interest. See, V. SCOTT, supra note 7 at § 405.

53Id. See also Mayfield v. Forsyth, 164 Ill. 32, 45 N.E. 403 (1896); Jackson v. Cleveland, 15 Mich. 94 (1866).

54Pomeroy suggests that resulting trusts are property segregable into two types. The first involves a gratuitous transfer which does not convey beneficial enjoyment. The second involves the more traditional situation in which A supplies the consideration for property which B purchases and places in his own (B's) name. 4 J. POMEROY, EQUITY JURISPRUDENCE, § 1031 (5th ed. 1941).


given Warren a general power of attorney directing him to 1) convert all of the mother-Eileen joint accounts into Warren-Eileen joint accounts, and 2) quitclaim deed the house into joint tenancy between Eileen and himself. Warren followed the latter direction, but never acted upon the bank deposit order. After his mother’s death, Warren, as executor, filed a citation and petition seeking to recover, as assets of his mother’s estate, Eileen’s share of the residence and all of the bank monies Eileen succeeded to as surviving joint tenant.

The trial court found that the presumption of donative intent implicit in the creation of the joint account was overcome by clear and convincing evidence and ruled that the monies were meant to be held by Eileen for the decedent’s care. The joint tenancy arrangement had been established solely for the decedent’s convenience with no change in ownership ever having been intended. The real estate was similarly treated.

Although the appellate court overturned the decision with respect to the residence, it allowed the holding with respect to the bank accounts to stand. As to the certificates, the court said Eileen had contributed nothing towards them, never had control of them until her mother had become disabled, and had admitted they were to be used for her mother’s care. Taking these facts into account with other similarly disposed testimony, the court confirmed that the petitioner had met his burden of overcoming the presumption of donative intent and concluded that the certificates were put into joint tenancy merely for the convenience of the decedent. Consequently, the monies were assets of the estate. Although the exact words were not used, it is suggested that the court in effect raised a resulting trust over the funds in favor of the grantor.

In reaching its conclusion the court cited a key passage from *In re Estate of Guzak* which set down, with appropriate authorities, relevant factors to be considered when questioning the efficacy of survivorship in a joint account. Of particular interest is the *Guzak* court’s specific reference to the surviving tenant’s own perception as to whether (s)he ever had an ownership interest and the issue of whether the account was created merely for convenience. Both of these factors cut to the heart of the question and, equally important, address the problem from opposite perspectives. An admission on the part of the survivor that (s)he never considered him-(her)self to possess an ownership

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57 Id. at 1085-86, 400 N.E.2d at 646.

58 The court was willing to apply the resulting trust doctrine to the residence as it did to the personality, but concluded that there was insufficient evidence to support the raising of a resulting trust with respect to the former.

61 Id. at 355, 388 N.E.2d at 433 (quoting Toman v. Svoboda, 39 Ill. App. 3d 394, 349 N.E.2d 668 (1976) and In re Estate of Elliott, 33 Ill. App. 3d 1046, 339 N.E.2d 378 (1975)).
interest can go a long way toward demonstrating no gift was intended. Similarly, evidence of the depositor's understanding that the joint account was merely a convenience can demonstrate the creator's state of mind against the making of a gift. Both of these elements could prove crucial to the successful raising of a resulting trust over transferred assets.

These decisions and others like them support the applicability of the resulting trust doctrine to otherwise gratuitous conveyances. It must be remembered, however, that in each of the cases a very careful reading of the facts was made before operation of the survivorship right was denied. Only when the court was completely satisfied that no beneficial interest was intended to be transferred did it so decide.

A reading of the available decisions could easily lead one to conclude that the tenancy for convenience is at best a variant strain of a resulting trust and does not prove that these trusts can be raised over ostensible gratuitous conveyances. Such a conclusion is incorrect. Consider the case of Shelley v. Landry where the court erected a resulting trust over a transfer which had many of the trappings of a gift.

In Shelley, the principal issue was whether or not a father's conveyance of individually-owned property into joint tenancy with his daughter was an immediate gift of the moiety to her. If it was not, then there would have to be a subsequent inquiry into what interest, if any, was actually transferred. The court noted that the transfer from a father to a daughter presumes a gift, but quickly pointed out that the presumption was rebuttable. Satisfied that the trial court was correct in holding that a gift had not been intended, the court held that the daughter held title to her moiety subject to a resulting trust. In reaching its decision the court specifically stated that the gratuitous conveyance into joint tenancy was not a bar to the erection of a resulting trust.

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42See, e.g., Herwick v. Stiehl, 68 Misc. 2d 850, 328 N.Y.S.2d 285 (1971) and In re Will of Imp, 68 Misc. 2d 911, 328 N.Y.S.2d 595 (1972), for the recognition of joint bank accounts for convenience in New York. These decisions represent a change from the longstanding view in New York that creation of a joint bank account by statute (Banking Law § 239 (3) (repealed 1964) raised the conclusive presumption of a gift to the other co-tenant(s). Even before the statute was repealed the courts, however, found ways to deny a surviving donee-tenant title to the funds. See, In re Creekmore's Estate, 1 N.Y.2d 284, 135 N.E.2d 193 (1965); and In re Estate of Donleavy, 41 Misc. 2d 28, 244 N.Y.S.2d 730 (1962). Banking Law § 675 presently provides a rebuttable presumption of a gift to the donee-tenant upon creation of a joint bank account. For a contrary viewpoint on the appropriateness of raising resulting trusts in these situations, see Smith v. Davis, 352 So.2d 451 (Ala. Civ. App. 1977).

43In Paluszak v. Wohlrab, 1 Ill. 2d 363, 115 N.E.2d 754 (1953) the court clearly enunciated this view. Interestingly, the court also took the opportunity to confine the decision of Kane v. Johnson, discussed supra, to its specific factual situation. See also, Peters v. Meyers, 408 Ill. 253, 96 N.E.2d 493 (1951); Kohlhaas v. Smith, 408 Ill. 535, 97 N.E.2d 774 (1951).


45Id. at 628.

46Authority cited by the court for this position included, Dunlap v. Dunlap, 218 S.W.2d 108 (Mo. 1948); Rowland v. Clark, 91 Cal. App. 2d 880, 206 P.2d 59 (1949); Socol v. King, 36 Cal. 2d 342, 223 P.2d 627 (1950).
Having concluded that the resulting trust was properly raised, the court went on to identify the trust res. It was determined that the father had intended to "retain all the beneficial interest in the premises except . . . whatever thereof remained at his decease . . . " Consequently, the trust was not raised over the daughter's entire moiety, but only over the father's present use, possession and enjoyment of it. In essence there had been a gift to the daughter, but it was only of the property remaining after the father's death. Thus, the court not only held that a resulting trust could be impressed over a ostensibly gratuitous transfer, but also recognized that less than the entire interest of the transfer could be the proper subject of the trust.

Although there may be merit for arguments to the contrary, there is ample support for the view that resulting trusts may be properly raised over ostensible gratuitous conveyances. This use of the resulting trust doctrine represents the better position. It seems that in a situation where title is in the name of one who does not or will not be permitted to enjoy beneficial ownership, it is difficult to argue that some sort of trust relationship does not exist between the title holder and the beneficial user. Massaging the facts for the purpose of arguing that an express trust rather than a resulting trust was established does not appear to be justified. Although the concern of the purists is understandable, the resulting trust should not be dismissed merely because its erection will have the same effect as if an express trust had been found. The better view can be found in Belton v. Buesing where the court, in deciding an inheritance tax matter, suggested that the distinction between certain express trusts and resulting trusts is fuzzy at best. Questioning the usefulness of distinguishing the two types of trusts in a gratuitous conveyance setting, the court noted it "would find a resulting trust wherever the circumstances surrounding the disposition of the property raise an inference, not rebutted, that the transferor does not intend that the person taking or holding the property, or a third person, should have the beneficial interest therein." The distinction between the trusts has perhaps been further obfuscated by judicial inexactness such as that found in Chamberlin v. Chamberlin. In Chamberlin, the court decided that the joint tenancy in issue was not intended as a gift to the non-contributing co-tenant. In upholding the trial court's determination that raised a resulting trust over the disputed moiety the court said that there was no reason to conclude "that a resulting trust was not intended

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67Shelley, 79 A.2d at 629.
69240 Or. 399, 402 P.2d 98 (1965).
70Id. at 101, n.63. An additional authority for this proposition the court cited Toney v. Toney, 84 Or. 310, 165 P. 221 (1917); and Gray v. Beard, 66 Or. 59, 133 P. 791 (1913).
in the real estate." The face value interpretation of the statement is the court’s apparent view that a resulting trust can be intended by the parties to the transaction and moreover, can be expressly created by agreement. Not only does such a belief add to the existing haze, it goes against the prevailing view that only express trusts can be created directly by express agreements between the parties.

One conclusion is inescapable. The distinction between the two types of trusts is by no means clear cut. The courts are not willing to give blind allegiance to catch phrases and neat academic theories that will deprive rightful owners of their property. It is suggested that parties to a transaction can, or ought to be able to, co-act to intentionally establish a resulting trust. Even if one is not willing to accept this more novel approach that a resulting trust can be expressly created by direct agreement, the presented authority compels acceptance of the fact that cooperative inter-party dealings can create a resulting trust.

A synthesis of the applicable rules and principles will put the operating framework of the resulting trust doctrine into focus. The starting point is the basic presumption that the titleholder of property owns it. Thus it follows that the burden of proving a resulting trust is on the person trying to raise it. If it can be shown that the consideration for the property was furnished by someone other than the titleholder, then a rebuttable presumption of a resulting trust may arise. If, in turn, the titleholder rebuts that presumption by showing he was intended to possess a beneficial interest, then the action ends and no trust results. The joint tenancy setting is somewhat simplified by the fact that the estate itself presumes the gift and a concomitant conveyance of beneficial enjoyment to the titleholder. If the proponent for raising the trust cannot overcome the presumption, the action need go no further. To prevail, it must be actually demonstrated that no gift was intended; merely showing a lack of donative intent is insufficient. The notion of a controlling negative intention is equally as important to raising resulting trusts over joint tenancies as it is in other situations, but it may be more difficult to demonstrate. However, the ability to use writings as the basis for proving the intention, coupled with the fact that the courts are willing to raise a resulting trust where either no trust or only an express trust was thought to be possible, has given the resulting trust doctrine a new look. The slipperiness of the distinction in certain situations between the express and the resulting trust has permitted the latter to be moved closer to the forefront as a devolutionary vehicle.

7Id. at 634.


7See Lutyens v. Ahlrich, 308 Ill. 11, 139 N.E. 50 (1923); In re Estate of Dzialowy, 53 Ill. App. 3d 585; 368 N.E.2d 780 (1977).
III. THE DEFECTIVE JOINT TENANCY

Given that gratuitously created joint tenancies can be impressed with resulting trusts, and that such trusts can arise directly or indirectly from agreements, it becomes incumbent upon the estate planner to ascertain what advantages, if any, can be had from the interaction of the two. It is suggested that when put together a "defective" joint tenancy results. This estate provides the benefits without any of the drawbacks associated with the use of joint tenancy. Specifically, the donor-tenant can avoid the probate process and its concomitant hardships, but not encounter the risks ordinarily accompanying the conveyance of an ownership interest. Additionally, certain tax exposure may be minimized, or even eliminated. The impact of these potential benefits make the defective joint tenancy worth considering.

As a preliminary matter, there are two possible types of defective joint tenancies. The first is completely defective in that the contributing tenant can "revoke" the tenancy at any time. A true tenancy for convenience, the resulting trust is imposed over the entire estate with the non-contributing tenant never being considered to have any beneficial interest in the estate whatsoever. As a variation on this form, there could be an inter-party agreement to the effect that a surviving non-contributing tenant could take title by operation of the survivorship rights if the contributing tenant did not "revoke" them. The completely defective joint tenancy offers great flexibility, but, when coupled with an informal agreement, may have difficulty passing muster with respect to certain testamentary devolution requirements.

The second type of estate is only partially defective. The donor-tenant intends to confer upon the donee a contingent future interest in the form of survivorship rights, but retains present use and control over the property. To this end the defective tenancy is akin to an irrevocable trust, the principal terms of which provide a life estate in the settlor coupled with a reversionary interest should the settlor survive the contingent remainderman (the donee-tenant). This is basically the analysis applied by the court in Shelley. It is suggested that the tenancy is only partially defective in that the main variation from the true joint estate is the failure to convey an immediate present interest of an entire moiety. Although perhaps not as flexible as its completely defective counterpart, the partially defective tenancy will not have its efficacy questioned by statutory testamentary standards.

"To the extent that the completely defective joint estate is not a "true" joint tenancy, the estate is not passing by virtue of the survivorship rights. Therefore it will devolve pursuant to the terms of the agreement. The agreement, unless properly executed, will not be considered a valid will or will substitute and may not be effective as a devolutionary device. See Butler v. Sherwood, 196 A.D. 603, 188 N.Y.S. 242 (1921), aff'd, 233 N.Y. 655, 135 N.E. 957 (1922); and Ward v. Hall, 38 A.D.2d 1003, 329 N.Y.S.2d 436 (1972).

"Unlike the completely defective tenancy, the partially defective tenancy can involve an immediate gift of the survivorship rights. The gift of the survivorship rights, albeit of a contingent interest, is nonetheless a present disposition of the property and therefore beyond the reach of the testamentary formality problem. See Tennant v. John Tennant Memorial Home, 167 Cal. 570, 140 P.2d 242 (1914); St. Louis County Nat'l Bank v. Fielder, 364 Mo. 207, 269 S.W.2d 483 (1953); Huber v. Backus, 79 S.D. 342, 112 N.W.2d 238 (1961).
The major advantage of either type of defective joint estate seems to be the donor-tenant’s ability to control the property during his (her) life and still see title vest pursuant to survivorship rights at the death of either tenant. Unlike with the traditional joint tenancy, the creating-tenant of the defective estate does not confer a present interest in the subject property to the co-tenant. Thus, the donor need not worry about the donee severing the tenancy and taking his (her) moiety immediately. Also, there is no present interest for a creditor of the donee to seize. Therefore, the donee’s financial difficulties would not create any hardship for the donor. Either of these events could disrupt the donor’s pattern of property distribution and force a reworking of his (her) entire estate plan. The control aspect of the defective tenancy, when matched with the benefits provided by its joint tenancy attributes, makes for a potentially attractive estate planning tool.

Although there are certain advantages attendant to the use of the defective joint tenancy, for it to be truly worthwhile any adverse tax consequences must not outweigh the non-tax benefits. Taxes of immediate concern are the federal income and transfer taxes, and in some cases, state income and inheritances taxes as well.

The defective joint tenancy will not provide any immediate federal or state income tax advantages. There might, however, be some tax benefits waiting down the road. Normally upon surviving a donor-tenant the donee’s basis in the tenancy property is composed of two elements. Half of the property is deemed to have been acquired by gift at the creation of the tenancy and thus carries over the donor’s basis to the donee as to that moiety. The other half is considered to be acquired from the deceased tenant and takes on a basis equal to the value on the date of death. When appreciated property is in-

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9 Of course, in the case of the completely defective estate title might not pass to the non-contributing tenant if he or she is the survivor. The tenancy might be strict for the convenience of the contributing tenant, and title would vest in his (her) estate. In no event can the title pass on to a third party not privy to the defective tenancy. A resulting trust cannot be raised in favor of a stranger. See Frame v. Wright, 233 Iowa 394, 9 N.W.2d 364 (1943); Balish v. Franham, 92 Nev. 133, 546 P.2d 1297 (1976). This is not to say that a third party could not take the property. The decedent could provide that property devolve to the third party in his (her) will. To the extent that the completely defective joint tenancy worked to vest title in the estate, it would so pass.

10 “Transfer taxes” used herein means the estate tax and gift tax of U.S.C.A. 26 chs. 11 and 12, respectively. Although the generation-skipping transfer tax (U.S.C.A. 26 ch. 13) is structurally part of the overall transfer tax system, its application to defective joint tenancies is too remote to warrant detailed consideration.

11 Generally the right to income generated by property as established by state law determines the tax accountability for that income. Under the defective tenancy, therefore, all of the income would be properly chargeable to the donor-tenant. If the tenants qualify for filing joint returns, no harm results. If not, then any income shifting possibilities are eliminated and some unwanted tax exposure might ensue. Of course, it is conceivable that the donor may want to retain the tax consequences, such as the case where the tenancy property generates a tax loss or credit which can be used to offset other income or a tax liability. Generally, however, these income tax concerns do not appear to be a motivating force for defective joint tenancy use.

12 I.R.C. § 1015(c) (1983). The donee’s basis would also be increased by any gift tax paid with “respect to the gift.” See, I.R.C. § 1015(d) (1983).

volved, the basis "steps-up" and wipes out any potential tax exposure on the appreciation accrued during the donor's ownership of the property. The step-up can be a valuable benefit that proves its worth when the surviving tenant disposes of the tenancy property.

Unlike the traditional tenancy which gives the donee a carry-over basis in one-half and a step-up basis in the other half of the property, the defective joint tenancies would in all instances provide the more favorable step-up basis for the entire tenancy estate. The donee-tenant always takes the totality of the estate from a decedent, thereby triggering the step-up rules. This benefit in itself might justify the existence of the defective joint estate, especially for smaller and medium-sized estate individuals who will probably not be affected by the transfer taxes.

The transfer tax consequences require a slightly more detailed analysis. Putting the cart before the horse, consider first the estate tax consequences. In a non-spousal joint tenancy situation, the gross estate of a deceased tenant includes the proportionate value of the tenancy property attributable to the decedent's contribution. Thus, absent qualifying contribution by a donee-tenant before or after the gift, the donor must include full value of the joint property in his gross estate. Under these facts, should the donee-tenant predecease the donor the entire value of the joint property is excludible from the donee's gross estate. A completely defective joint tenancy would not be subject to this rule since it would not be considered a joint interest as contemplated by the statute. Nevertheless, the same tax treatment would result.

The Economic Recovery Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 (1981), increased the uniform credit available to individuals to such levels that the transfer taxes may well be a thing of the past for many estates. The credit will essentially shelter $600,000 of asset value from transfer taxation by 1987. The phase-in on the credit increases is as follows under I.R.C. § 2010 (1983):

<table>
<thead>
<tr>
<th>Applicable Year</th>
<th>Credit</th>
<th>Asset Value Equivalent</th>
</tr>
</thead>
<tbody>
<tr>
<td>1983</td>
<td>$ 79,300</td>
<td>$ 275,000</td>
</tr>
<tr>
<td>1984</td>
<td>96,300</td>
<td>385,000</td>
</tr>
<tr>
<td>1985</td>
<td>121,800</td>
<td>400,000</td>
</tr>
<tr>
<td>1986</td>
<td>155,800</td>
<td>500,000</td>
</tr>
<tr>
<td>1987</td>
<td>192,800</td>
<td>600,000</td>
</tr>
</tbody>
</table>

The same changes are applicable with respect to the gift tax. See I.R.C. § 2505 (1983).

The definition of joint property as found in Reg. 20.2040-1(b) is not entirely clear. It seems to exclude completely defective tenancies, but might pull the partially defective estate, especially with respect to a joint bank account, into its ambit. The better view is that state law determines the property interests which are ultimately taxed at the federal level. In the leading case of Estate of Chrysler, 361 F.2d 508 (2d Cir. 1966), the court disregarded the joint ownership of certain bank accounts and treated them as if they were the sole property of the non-contributing tenant. Seemingly only "true" joint tenancies under state law will be included in the gross estate under I.R.C. § 2040 (1983).
Upon the death of the donor-tenant the entire amount would be includible in the decedent's gross estate since the donor either owned or controlled the entire tenancy at his (her) death. If the donee-tenant dies first, no estate tax accounting would be necessary. Insofar as the completely defective joint tenancy is concerned there are neither any estate tax benefits to be had nor detriments to be suffered.

The partially defective joint tenancy requires a slightly different analysis. Again, the joint tenancy tax rules would not apply. There is no reason, however, to simply include as part of the gross estate the full value of the tenancy as property owned by the deceased donor tenant. Instead, the full value of the property would have to be included under one of the transfer sections. The results are identical, but for different reasons. Again, should the donee-tenant die first no estate tax accounting will be necessary. In the partially defective joint tenancy the donee-tenant has a property interest, but it is contingent upon the donee surviving the donor. If the donee predeceases the donor, the donee's interest expires and no gross estate inclusion would ensue. As with the completely defective estate, the ultimate estate tax consequences of the partially defective and traditional joint tenancy are the same.

Some disparity emerges when the joint tenancies are exclusively between spouses. In these situations the general contribution rule gives way to the fractional interest rule for qualified interests, which includes one-half of the value of the property in the estate of the first spouse to die, regardless of actual contribution by either spouse. The rules applicable to defective joint tenancies in non-spousal situations would, however, apply with equal force in the otherwise qualified interest setting. Thus, the defective tenancy would increase the gross estate of the donor-tenant upon his (her) predeceasing the donee, but would decrease the estate of the donee-tenant if (s)he were the first to die. In either event, the marital deduction would eliminate any adverse tax exposure.

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83I.R.C. § 2033 (1983) includes in the gross estate the value of property to the extent of the decedent's interest therein. Thus, if it is argued, as in the case of the completely defective estate, that the decedent "owned" the entire estate, it would be fully includible in the gross estate. The argument that the decedent owned less than all (as with the case of the partially defective estate or some completely defective tenancies subject to other agreements) and thus should include a lesser amount in the gross estate under I.R.C. § 2033, would succeed. But then the transfer sections, specifically I.R.C. §§ 2036, 2037 and 2038 (1983), would apply and force full inclusion in the gross estate. I.R.C. § 2036 seems directly applicable as the decedent in the defective tenancy always has retained a life estate in the property.

89There is nothing that the donee-tenant ever really owned that could be included in the gross estate. The only possible taxable interest would be the survivorship rights, but by the donee-tenant predeceasing the donee, the contributing co-tenant these rights have expired and have no taxable attributes. See Comm'r v. Rosser 64 F.2d 631 (3d Cir. 1933); and Christiernin v. Manning, 138 F. Supp. 923 (D.N.J. 1956).

91See supra note 85.

92A "qualified joint interest" is a joint tenancy with rights of survivorship wherein the spouses are the only joint tenants, or a tenancy by the entirety. I.R.C. § 2040(b)(1) (1983).


94I.R.C. § 2056(a) (1983), as amended by the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34 § 403(a)(1)(B), 95 Stat. 172, 301 now provides a marital deduction for the full value of the interest transferred to the surviving spouse by the decedent. This, as long as the property interest otherwise qualifies (i.e., is not a non-deductible terminable interest), effectively generates a tax wash. The same is now true for inter-spousal gifts. See I.R.C. § 2523(a) (1983).
Unlike the estate tax situation, the defective joint tenancy can avoid the gift tax exposure encountered by the traditional joint estate. Generally the creation of a joint tenancy is a taxable event giving rise to a gift of the donee's moiety and an immediate tax accounting thereon. This is not the case with respect to the completely defective joint tenancy since the transfer is effectively revocable and the property is still within the donor's dominion and control. The creation of a partially defective joint tenancy will, however, generate different gift tax consequences. The donee's survivorship rights, even though contingent, are a property interest within the ambit of the gift tax. The fact that the interest may be difficult to value will not prevent the tax, although it is suggested that the taxable value may be small enough to make any actual tax exposure negligible.

It is worth noting that neither the traditional joint tenancy nor either of the defective tenancies will eliminate post-transfer appreciation from taxation, a benefit usually associated with gift giving. In each of the joint tenancy situations the tenancy property will be part of the gross estate and thus be included at date of death values. The major transfer tax difference between the traditional and defective tenancies, then, seems to be the higher gift tax cost attendant to the creation of the former. The gift tax value of the moiety will probably be greater than that of a contingent interest of a partially defective joint tenancy and certainly more onerous than the "incomplete transfer" situation of the completely defective joint tenancy.

Whereas the federal transfer taxes are not significantly affected by the defective joint tenancy, state inheritance taxes can be. Since inheritance taxes are charges upon the recipients of property, surviving joint tenants bear the cost of assuming full title to tenancy estates. This is usually true regardless of the respective contributions made by the tenants. Thus, if the donee-tenant is the first to die, the donor-tenant could very well incur an inheritance tax for the privilege of reacquiring his (her) own property.

One taxpayer caught in such a situation resorted to the resulting trust in an effort to avoid the tax. In *In re Estate of Wilson*, the court recognized...
a resulting trust in favor of the husband-taxpayer over jointly owned property he had held in joint tenancy with his deceased wife, but concluded that this did not work to defeat the imposition of the tax. By surviving his wife the taxpayer acquired a valuable interest — the deceased-tenant's survivorship rights. Without these survivorship rights the taxpayer was incapable of alienating the totality of the joint estate. Thus, even though the deceased tenant's entire moiety was not passing for purposes of the inheritance tax, something of taxable value was. Unfortunately, the court neither valued nor provided directions on how to value the interest. The case was remanded to the circuit court where presumably the valuation was to be made.

The facts in Wilson indicate that partially defective joint tenancies were involved. Despite the fact that the tax was not avoided, it seems reasonable to conclude that the tax on receiving the survivorship rights will generally be less than the tax on the right to receive the decedent's entire moiety. To this extent the partially defective joint estate provides some benefit. Moreover, implicit in the Wilson holding is that if the taxpayer had not acquired the survivorship rights of the decedent there would not have been a transfer upon which the tax could attach. This would be the result when a completely defective joint tenancy is at issue. When using this type of defective tenancy the donor-tenant can retain his (her) property without incurring any inheritance taxes. Of course, with respect to both types of defective tenancies, if the donor-tenant predeceases the donee the tax burden will be greater than that which would have been encountered had the traditional joint estate been used. But then that is usually the case in these matters where the possibility of the tax is the cost of control.

IV. CONCLUSION

At this juncture it seems fair to conclude that the resulting trust doctrine is neither antiquated nor totally without current estate planning value. In what may have in some instances been intended as a means of bailing out the imprecise handiwork of counselors, the courts, perhaps unintentionally, have put a new wrinkle on the use of resulting trusts. Whether inadvertently or not, the courts have seemingly struck down the barrier that effectively prohibited the planned use of the resulting trust doctrine. Moreover, the willingness on the part of some courts to discard the sometimes vague distinction between express and resulting trusts has opened new avenues for creative pursuit and possibly added to the overall attractiveness of joint tenancy. The defective joint estate offers easy access to planning opportunities that are otherwise difficult to obtain. Understandably, one may be chary to actively embrace any new...
concept without its undergoing a thorough testing and without a complete understanding of when it will be applied. Immediately disturbing questions include whether existing joint interests are more susceptible now to easy undoing than they were before, and whether all future joint interests will require accompanying proof that a resulting trust was not intended. Perhaps now is the time to press the courts and seek guidance from the legislature on the exact role resulting trusts will be permitted to play. Only after receiving such clarification can one determine if there are in fact any modern maneuvers for this dated doctrine.