DIVISION II

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN MAUZY PITTMAN, Chief Judge

CA06-343

December 20, 2006

EARNEST BRADFORD
APPELLANT

v.

JUDY COSSEY
APPELLEE

AN APPEAL FROM LONOKE COUNTY
CIRCUIT COURT
[No. CV04-0195]

HONORABLE PHILLIP WHITEAKER,
CIRCUIT JUDGE

AFFIRMED ON DIRECT APPEAL; AFFIRMED AS MODIFIED ON CROSS-APPEAL

This appeal involves a dispute between a father, appellant Earnest Bradford, and his daughter, appellee Judy Cossey, over the ownership of seven parcels of real property in Pulaski and Lonoke Counties. Appellant is seventy-five years old and having had a limited education, is not very literate; he is, however, an experienced businessman. Until his wife died in 1989, she handled his paperwork. After her death, appellee assumed those duties. As the trial court found, appellant "has a history of transferring legal ownership of property to his children while attempting to maintain a certain degree of control or authority." In 1991, appellant conveyed Parcel One, a one-acre tract located along U.S. Interstate 67-167, to appellee. A large billboard, which produces monthly rent, is located on this parcel. Until this lawsuit, appellant collected the billboard rent without appellee's objection. After obtaining

title, appellee took out a loan, secured by a mortgage on the property, so that she could construct a building there. Appellee has since then collected the rent from that building. She has mortgaged the property several times, and some of the proceeds of those loans have benefitted appellant.

In 1992, appellant conveyed Parcel Two to appellee and her erstwhile husband, Hardy Styers, in exchange for $100,000. The Hollywood Club is on this parcel, which is also located along the interstate highway and is adjacent to Parcel One. Until the conveyance to appellee, appellant owned and operated the club. In order to obtain financing for the purchase, appellee and her husband needed additional collateral. The trial court found that appellant gave appellee and Mr. Styers a deed to Parcel Three, a five-acre tract within the City of Cabot, to provide additional collateral for the loan with which they purchased Parcel Two. Appellee and Mr. Styers operated the club as owners until they divorced in 1995, and after that, appellee has continued to operate it. Since the conveyance of Parcel Three, appellee has mortgaged it to pay appellant's debts.

Appellant deeded Parcel Four, a .72-acre tract located behind the Hollywood Club, to appellee on February 25, 2002. After the conveyance, appellant decided to build a building on this parcel; even though appellee did not agree with this decision, she mortgaged the parcel to finance the building's construction. The rent from this building has been collected by both parties. Appellant also deeded Parcel Five, a .67-acre tract located behind the Hollywood Club, to appellee on February 25, 2002. Appellant decided to construct a building on this parcel; with misgivings, appellee mortgaged Parcel One to cover the cost

of construction. Appellee has received most of the rent from this building. On February 25, 2002, appellant gave a deed to Parcel Six , a .63-acre tract behind the Hollywood Club and adjacent to Parcel Four, to appellee. The same date, he gave appellee a deed to Parcel Seven, a 1.05-acre tract located behind appellee's residence. Appellant owns a mobile home, which generates rent, that is located on Parcel Seven.

Appellant filed this action against appellee on April 16, 2004, in the Lonoke County Circuit Court, alleging that he had conveyed the seven parcels to appellee so that she could manage his business affairs. Asserting that appellee held the property under an implied trust, he asked that he be declared the owner of all of the property. Appellee filed a counterclaim alleging intentional interference with contractual relations, assault and battery (for punching her in the face and threatening to kill her at the club and for pointing a gun at her at her home), and outrage. Appellee amended her counterclaim to add a claim for the rent on the billboard and on the trailer.

Trial was held on September 14, 2005. The parties, appellant's other children, Mr. Styers, a banker, and several family friends testified. In the order entered on November 2, 2005, the trial court made the following findings of fact:

> 5. There is no evidence of expressed terms of any confidential or fiduciary relationship existing between the parties. There is no evidence that the [appellant] transferred any property to the [appellee] upon an oral condition that she hold the title for the [appellant's] benefit. There is no evidence that the [appellee] orally promised to hold the title for the [appellant's] benefit. There is no evidence of any lies, deceit, tricks, or fraud to induce the transfers of property.
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> 6. The [appellant] admits striking the [appellee] in her place of business in the presence of patrons. As a result, the [appellee] experienced a busted lip. The [appellant] admits making threats to harm the [appellee]. As a result, the [appellee]

has become more cautious, spends less time alone, and installed a security fence. There is no evidence of medical expenses or expenses associated with constructing of any fence.

In its conclusions of law, the trial court stated:

1. The [appellant] has failed to prove by full, clear, and convincing evidence the necessary elements of a constructive, resulting, or implied trust on Parcel One. *Nichols v. Wray*, 325 Ark. 326, 925 S.W.2d 785 (1996). However, the [appellant] has proven and shall maintain a life estate in the billboard rents generated from this parcel, and shall have access to the billboard limited to what is necessary to maintain it.

2. The [appellant] has failed to prove by full, clear, and convincing evidence the necessary elements of a constructive, resulting, or implied trust on Parcel Two. See *Nichols*, ibid. On the contrary, the evidence concludes that title to the "Hollywood" was the result of an "arms length" sale transaction.

3. The [appellant] has proved by full, clear, and convincing evidence the necessary elements of a resulting trust on Parcel Three. A resulting trust arises in favor of the person who transfers property or caused it to be transferred under circumstances raising an inference that he intended to transfer to the other a bare legal title and not to transfer the beneficial interest. *Edwards v. Edwards*, 311 Ark. 339, 843 S.W.2d 846 (1992). There need be no evidence of fraud or fiduciary duty for the imposition of a resulting trust. *Ripley v. Kelly*, 207 Ark. 1011, 183 S.W.2d 793 (1944). The evidence is clear and convincing that bare legal title was transferred for the purpose of obtaining financing for the purchase of the "Hollywood" and for no other reason.

4. The [appellant] has failed to prove by full, clear, and convincing evidence the necessary elements of a constructive, resulting, or implied trust on Parcel Four, Five, and Six. See *Nichols*, ibid.

5. The [appellant] has failed to prove by full, clear, and convincing evidence the necessary elements of a constructive, resulting, or implied trust on Parcel Seven. See *Nichols*, ibid. However, the [appellant] is the owner of a mobile home located on Parcel Seven. He is entitled to obtain possession of the personal property by any peaceful means. Until such time as the personalty is removed, the [appellant] shall have access to the personalty for purposes of maintaining and collection of rents.

6. The [appellee]/Counter-Claimant has proved her claim of interference with business expectancy and has suffered damage in the amount of $1,200.00. This

amount is reduced to a judgment upon which garnishment and execution may issue and post-judgment interest shall accrue, as allowed by law.

7. The [appellee]/Counter-Claimant has proved that the [appellant] assaulted her and committed a battery. However, she has failed to prove any damage, and the Court awards her no monetary benefit.

8. All other claims and relief of the parties are denied.

Appellee moved for additional findings of fact, amendment of judgment, and new trial on November 9, 2005. She challenged the imposition of the trust on Parcel Three; in the alternative, she argued that, if the court refused to amend that decision, she should be awarded the total amount of the mortgage payments that she had made on the debt that was secured by that parcel. She noted that, at trial, she had testified that she had made monthly mortgage payments of $620 since April 2004 and asked that she be awarded $13,020. She also requested that the trial court order appellant to be responsible for future payments and to remove the trailer from her property within six months.

The trial court entered an amended order on November 29, 2005, adding a finding that, as of November 8, 2005, the $620 monthly mortgage payments that appellee had made toward the mortgage on Parcel Three since April 2004 totaled $13,020 and awarded judgment in that amount to appellee. It also directed that appellant would be solely responsible for the mortgage and gave appellant six months from the entry of the November 2, 2005, order to refinance the debt in his name or to pay it off; if he failed to do so, the property would remain the sole and separate property of appellee. The court also directed appellant to remove his trailer from Parcel Seven within six months. Appellant filed notices of appeal from both orders. Appellee filed a notice of cross-appeal.

We review traditional equity cases *de novo* on the record and will not reverse a finding of fact by the trial court unless it is clearly against the preponderance of the evidence. *Williams v. Williams*, 82 Ark. App. 294, 108 S.W.3d 629 (2003). In reviewing the trial court's findings, we give due deference to the trial court's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Id*. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Nichols v. Wray*, 325 Ark. 326, 925 S.W.2d 785 (1996).

Appellant makes the following arguments: (a) the trial court erred in finding that he failed to prove the required elements of an implied trust as to Parcels One, Two, Four, Five, Six, and Seven; and (b) the trial court erred in requiring appellant to reimburse appellee $13,020 for her payments on the mortgage on Parcel Three. For her cross-appeal, appellee argues that the trial court erred in imposing a resulting trust on Parcel Three; she does not challenge the trial court's decision that appellant owns a life estate in the billboard rents on Parcel One.

The trial court found that there was "no evidence of expressed terms of any confidential or fiduciary relationship existing between the parties." Appellant challenges this finding, arguing that the parties did in fact have a confidential relationship. He points out that, after his wife's death, appellee handled appellant's bills and business affairs; that he has a limited education; that he is seventy-five years old and suffers from health problems; and that, until this dispute, the parties had a close and loving relationship. Appellee's

extensive testimony about all of the personal and business financial matters she handled for her father support his position.

We agree with the trial court that there were no "expressed terms" regarding such a relationship; however, the evidence established an unspoken, but equally real, confidential relationship. A confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind. *Lucas v. Grant*, 61 Ark. App. 29, 962 S.W.2d 388 (1998). Relationships deemed to be confidential are not limited to those involving legal control; they also arise whenever there is a relation of dependence or confidence, especially confidence that springs from affection on one side and a trust in reciprocal affection on the other. *Id*. There is no set formula by which the existence of a confidential relationship may be determined, for each case is factually different and involves different individuals. *Id*. Whether two individuals have a confidential relationship is a question of fact. *Id*. The mere proof of kinship alone does not give rise to a confidential relationship. *Andres v. Andres*, 1 Ark. App. 75, 613 S.W.2d 404 (1981). *But see Norton v. Norton*, 227 Ark. 799, 302 S.W.2d 78 (1957) (holding that a mother-grantor, son-grantee relationship was a confidential one requiring the grantee son to prove the absence of undue influence). As discussed below, the existence of a confidential relationship does not, of itself, establish the need for imposing a constructive trust; that would be proper only if appellee committed an abuse of the relationship.

The trial court found that there was no evidence that appellant transferred any property upon an oral condition that appellee hold title for his benefit, or that she orally

promised to do so, and that there was no evidence of any lies, deceit, tricks, or fraud to induce the transfers of property. Appellant does not challenge these findings of fact. Instead, he challenges the trial court's conclusion that he failed to establish the elements of a constructive or resulting trust on Parcels One, Two, Four, Five, Six, and Seven. Appellant correctly argues that the imposition of a constructive trust does not necessarily depend on any oral promise by the grantee to hold title for the grantor, or on any lies, deceit, tricks, or fraud. The term "implied trust" includes constructive trusts, trusts ex maleficio,[1] and resulting trusts, all of which arise by implication of law. *Andres v. Andres*, *supra*. Such trusts arise whenever it appears from the accompanying facts and circumstances that the beneficial interest should not go with the legal title. *Id*. Ordinarily, a constructive trust arises without regard to the intention of the person who transferred the property; on the other hand, a resulting trust arises in favor of the person who transferred or caused it to be transferred under circumstances raising an inference that he intended to transfer to the other a bare legal title and not to give him the beneficial interest. *Edwards v. Edwards*, 311 Ark. 339, 843 S.W.2d 846 (1992).

A resulting trust arises in one of the following situations: where a private or charitable trust fails in whole or in part; where a private or charitable trust is fully performed without exhausting the trust estate; or, where property is purchased and the purchase price is paid by one person and, at his direction, the vendor transfers the property to another person. *Bottenfield v. Wood*, 264 Ark. 505, 573 S.W.2d 307 (1978). Only a purchase-money

[1]Appellant concedes that a trust ex maleficio was not appropriate in this case.

resulting trust could be arguably relevant here. A purchase-money resulting trust may be created when property is paid for with one person's money and title is taken in the name of another; the person furnishing the consideration for the purchase is said to have all of the beneficial or equitable interest in the property, and the person into whose name the property was transferred has only bare, legal title. *First National Bank v. Rush*, 30 Ark. App. 272, 785 S.W.2d 474 (1990). The theory of a resulting trust is that grantors expect something for their money, and, when they pay the purchase price but direct that the property be conveyed to a third party who is a stranger, the presumption is that there has been no gift to the third party but a conveyance of the property to be held in trust for the party who paid the purchase price. *Edwards v. Edwards*, *supra*. If, however, the third party stands in such relationship to the party furnishing the purchase money as to be the natural object of his or her bounty, things get more complicated, as a gift may have been intended. In *First National Bank v. Rush*, *supra*, we stated that the presumption of gift could be overcome only by clear and convincing proof that no such gift was intended. In general, a resulting trust must also be proven by clear and convincing evidence. *Edwards v. Edwards*, *supra*.

As appellee correctly points out, a purchase-money resulting trust results from the original transaction at the time it takes place and at no other time, and it is founded on the actual payment of money and upon no other ground. *Walker v. Hooker*, 282 Ark. 61, 667 S.W.2d 637 (1984); *Andres v. Andres*, *supra*. Therefore, the transfers of the property to appellee did not fit within the elements of a resulting trust, because appellant did not pay for those parcels when title was transferred to appellee.

A constructive trust is a remedial rather than a substantive institution that is designed to avoid unjust enrichment, *Betts v. Betts*, 326 Ark. 544, 932 S.W.2d 336 (1996), and is implied by operation of law when equity demands. *Tripp v. Miller*, 82 Ark. App. 236, 105 S.W.3d 804 (2003). It is imposed when a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. *Id*. The duty to convey the property may arise because it was conveyed through fraud, duress, undue influence or mistake, breach of fiduciary duty, or wrongful disposition of another's property. *Id*. The basis of a constructive trust is the unjust enrichment that would result if the person having the property were permitted to retain it. *Id*. To impose a constructive trust, there must be full, clear, and convincing evidence leaving no doubt with respect to the necessary facts. *Id*. The burden is especially great when title to real estate is sought to be overturned by parol evidence. *Id*. *Accord Waterall v. Waterall*, 85 Ark. App. 363, 155 S.W.3d 30 (2004). While a confidential or fiduciary relationship does not in itself give rise to a constructive trust, an abuse of confidence rendering the acquisition or retention of property by one person unconscionable against the other suffices generally to ground equitable relief in the form of the declaration and enforcement of a constructive trust. *Hall v. Superior Federal Bank*, 303 Ark. 125, 794 S.W.2d 611 (1990).

Although the imposition of a constructive trust requires clear and convincing evidence of the necessary facts, the test on review is not whether we are convinced that there is clear and convincing evidence to support the trial court's findings but whether we can say

that the trial court's finding as to whether the disputed fact was proven by clear and convincing evidence is clearly erroneous. *Tripp v. Miller*, *supra*.

Appellant testified that he conveyed Parcel One to appellee, who had begun taking care of his business, so that they could mortgage the property if they needed money. He said that, after his wife's death, he had a heart attack and open-heart surgery and thought he was going to die. He stated that he deeded it to appellee so she could take care of it for him in case something happened to him. He testified that, over the next ten years, he received the billboard rent and appellee collected rent from the building on this parcel, which provides additional parking for the Hollywood Club.

Appellant acknowledged selling the Hollywood Club on Parcel Two to appellee and her husband in 1992, although he claimed that they had not paid him the full purchase price of $250,000. Appellant told appellee and her husband that they could use Parcel Three as collateral for the loan to purchase Parcel Two. They did so and later paid off that loan. About four to six years ago, appellant testified, he asked appellee to mortgage this property for $40,000 to pay off the money he owed to the Bank of Cabot; he told her that he would make the payments on that debt.

Appellant stated that, before he gave the deeds to appellee for Parcels Four, Five, and Six, he had been gravely ill and did not know if he would live. He said that he told appellee that he would put the property in her name so she could take care of them for him and denied making a gift of them to her. He stated that both parties had collected the rent from the buildings on these parcels. He said that, although appellee managed the buildings, his intent

in building them, which he told appellee, was to give each of his four children a building so that each would have some income.

Appellant testified that he conveyed Parcel Seven to appellee because he intended to build some duplex apartments there for his son Allen to have some rental income. He testified that, because Allen was in prison for "a bunch of DWIs," he told appellee that he would keep the property in her name until it was clear that Allen "was going to stay straight." Appellee, however, stated that she asked her father to give her this parcel because it adjoins her property and that he agreed to do so.

The parties lived next to each other. Appellant testified that appellee, who was on his bank account, had managed his property for him until that fall; that she paid the taxes and insurance; that, whenever he wanted money, she would give it to him; and that she mortgaged the property whenever he asked her to do so. According to appellant, the parties' "falling out" began over his disapproval of appellee's boyfriend.

Appellee testified that she believed that she had either bought or been given these properties; that her father never asked her to hold them in any sort of trust; that she let him make improvements on the parcels because he was her father, whom she loved, and because she would do whatever he wanted her to do; that she never agreed to split up the properties equally among her siblings; and that, whenever her father asked for money, she gave it to him.

In light of the heavy legal burden appellant bore in seeking to impose implied trusts on these parcels deeded to appellee and the trial court's opportunity to assess the witnesses'

credibility, we affirm the trial court's decision as to Parcels One, Two, Four, Five, Six, and Seven.

Appellant also argues that the trial court miscalculated the amount due appellee for the monthly payments of $620 that she made toward the mortgage on Parcel Three. According to appellant, there were only nineteen payments from April 2004 through November 2005. Actually, he is mistaken — there were twenty. Also, appellee testified that, when she started making the payments in April 2004, appellant had fallen behind by one month. Therefore, the trial judge's calculations, based on twenty-one monthly payments, were correct.

Appellant also argues that the trial court erred in awarding anything to appellee for those payments. Although the judge was not required to do so, this award was equitable. A court of equity may mold any remedy that is justified by the proof. *Cox v. Cox*, 17 Ark. App. 93, 704 S.W.2d 171 (1986). Therefore, we affirm on this point.

For her cross-appeal, appellee asserts that the trial court erred in imposing a resulting trust on Parcel Three. As discussed above, a resulting trust should not have been imposed upon any of the parcels because the transfer of title to appellee did not occur when appellant paid the purchase money for them. However, a constructive trust would be an appropriate remedy as to Parcel Three. By appellee's admission, she did not begin making the mortgage payments on Parcel Three until April 2004, when appellant stopped making them. Appellant testified that he offered to convey Parcel Three to appellee and her husband only so they could use it as collateral to secure the $100,000 loan they received to purchase the club on

Parcel Two. Mr. Styers testified that he had assumed that Parcel Three would be reconveyed to appellant after the loan was paid. Although appellee asserts that she was not expected to reconvey Parcel Three to appellant, she admitted that he conveyed it to her after she and Mr. Styers were otherwise unable to obtain the $100,000 loan.

We affirm the trial court's decision to impose an implied trust on Parcel Three, with the modification that it be characterized as a constructive, not a resulting, trust. We will affirm a decree if it appears to be correct upon the record as a whole, even though the trial court may have given, in whole or in part, the wrong reason for the result it reached. *First National Bank v. Rush*, *supra*.

Affirmed on direct appeal; affirmed as modified on cross-appeal.

GLADWIN and ROBBINS, JJ., agree.