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Unnecessary but Proper: The Missouri Court of Appeals Expands the Constructive Trust Doctrine While Ignoring the Recording Act

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Brown v. Brown[1]

I. INTRODUCTION

Missouri common law has long held that a constructive trust should be imposed only in cases of fraud or other wrongful conduct.[2] The Missouri Court of Appeals overruled that precedent in *Brown v. Brown*, holding that a mere mistake is a sufficient ground for imposing a constructive trust.[3] With this decision, the court considerably expanded the circumstances under which a plaintiff may be entitled to this equitable remedy.

While the essential holding of *Brown* is a positive step for Missouri case law, the decision failed to distinguish between a mistaken conveyance that is purely gratuitous and one that is supported by consideration.[4] This Note explains why such a distinction is necessary and argues that the broad holding in *Brown* should be limited to those cases where the conveyance is supported by consideration. Regardless of whether this proposed limitation is adopted, Missouri practitioners should be aware that this distinction has the potential to significantly limit the application of *Brown* in future cases.

In addition, this Note emphasizes the importance of Missouri's recording act[5] in cases where title to property is allegedly affected by the order in which deeds are recorded. In *Brown*, the Missouri Court of Appeals ignored the purpose and function of the recording act, concluding that the error in recording altered the interests of the parties.[6] Practitioners should be aware of the longstanding principles that suggest that the court erred in reaching this conclusion.[7]

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1. 152 S.W.3d 911 (Mo. Ct. App. 2005).

2. *See, e.g.*, Schultz v. Schultz, 637 S.W.2d 1, 4 (Mo. 1982); Beach v. Beach, 207 S.W.2d 481, 486 (Mo. 1948); Ferguson v. Robinson, 167 S.W. 447, 452 (Mo. 1914) (en banc).

3. *Brown*, 152 S.W.3d at 919.

4. *See* discussion *infra* Part V.A.

5. MO. REV. STAT. §§ 442.380-.400 (2000).

6. *See Brown*, 152 S.W.3d at 915, 919-20.

7. *See* discussion *infra* Part V.B.

II. FACTS AND HOLDING

Edward and Catherine Brown purchased twenty acres of rural property near Odessa, Missouri, in 1966.[8] They had four children: John, Pam, Joseph, and Carolyn.[9] When Edward died in 1988, Catherine became the sole owner of the homestead.[10] A year after her husband's death, Catherine executed a deed granting the property "to [herself] and her son John as joint tenants with right of survivorship."[11] Eight years later Catherine executed another deed, conveying "her remaining interest in the land to [herself] and her daughter Pam as joint tenants with right of survivorship."[12] Because this conveyance did not give Pam an equal interest in the property, the three decided that they should restructure the title so that each would have a one-third interest in a joint tenancy with right of survivorship.[13] On August 23, 1999, the three took their previously-recorded deeds and visited attorney Joyce B. Kerber.[14]

At trial, Kerber testified that the three family members asked her to "prepare appropriate instruments that would leave the property titled in the names of Catherine, John, and Pam as joint tenants with right of survivorship."[15] To effectuate this request, Kerber prepared three quitclaim deeds.[16] The first two deeds were designed to restore Catherine as the sole owner of the property: one from John and the other from Pam, relinquishing all of their interest back to their mother.[17] The third deed was drafted to grant the interests that the parties intended: from Catherine as sole owner to herself, John, and Pam as joint tenants with right of survivorship.[18]

On September 30, 1999, Catherine and Pam returned to Kerber's office and executed the two deeds that were prepared in their names.[19] On November 1, 1999, John executed the remaining quitclaim deed, and attorney Kerber

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8. *Brown*, 152 S.W.3d at 914.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* Catherine's first conveyance granted one-half interests in the property with right of survivorship to herself and John. *See id.* Thus, at the time of her conveyance to Pam, Catherine could only transfer her one-half interest. *See id.* Catherine's conveyance to herself and Pam severed the joint tenancy and split her one-half interest, leaving both her and Pam with one-fourth interests as tenants-in-common. John still held his one-half interest as a tenant-in-common, but his right of survivorship was destroyed by Catherine's conveyance to Pam. *See generally* WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 5.4 (3d ed. 2000).
14. *Brown*, 152 S.W.3d at 914.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 915.

forwarded all three deeds to the Lafayette County Recorder of Deeds for recordation.[20] When all three deeds arrived at the recorder's office on the same day, they were recorded in the reverse order of the parties' intention.[21] Catherine's deed conveying the joint interest was recorded first, followed by John and Pam's deeds relinquishing all of their interest back to their mother.[22] The reversed order of recording appeared to destroy the interests that the parties had intended to create, leaving Catherine with full legal title in fee simple absolute and her children with nothing.[23]

Catherine made one more attempt to transfer the property by executing and recording a beneficiary deed in April 2002.[24] This deed granted a one-fourth interest to each of her four children with right of survivorship, to become effective upon Catherine's death.[25] John and Pam believed that the 1999 conveyances entitled them to a present one-third interest in the property, which would become a one-half interest if they survived their mother.[26] When they confronted Catherine about the beneficiary deed, she refused to revoke it.[27] On June 12, 2002, John and Pam brought this action asking the court to impose a constructive trust, correcting the recording error and restoring the parties' rights under the intended 1999 conveyances.[28]

After a one-day trial in Lafayette County Circuit Court, Judge Rolf determined that the 1999 recording error left Catherine as sole owner of the property, contrary to the intention of the parties at the time the deeds were executed.[29] Since the intent and purpose of the parties was to convey title to Catherine, Pam, and John as joint tenants with right of survivorship, the court issued an order imposing the constructive trust sought by John and Pam.[30] Judge Rolf explained that the court's equitable remedy was necessary to prevent the plaintiffs from being defrauded of their property interest and to prevent the defendant from being unjustly enriched.[31] Catherine was ordered to execute a deed that would restore the parties' originally intended interests.[32]

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20. *Id.*

21. *Id.* Attorney Kerber testified that she could not remember whether she had included appropriate instructions for recording the deeds in proper order. *Id.*

22. *Id.*

23. *Id.* Although the recorded documents *appeared* to leave Catherine as the sole title holder, the court may have been mistaken in arriving at this conclusion without further analysis. *See* discussion *infra* Part V.B.

24. *Brown*, 152 S.W.3d at 915.

25. *See id.*

26. *See id.*

27. *Id.*

28. *Id.*

29. *Id.* at 915.

30. *Id.* at 915-16.

31. *Id.* at 916.

32. *Id.*

Catherine appealed,[33] alleging that "unjust enrichment of one party, absent a showing of actual or constructive fraud, is insufficient to invoke a constructive trust."[34] The court of appeals disagreed, holding that "mistake is a sufficient ground for the imposition . . . of a constructive trust."[35] The court declared that "the touchstone for the imposition of a constructive trust is injustice or unfairness."[36]

III. LEGAL BACKGROUND

As the Missouri Court of Appeals for the Western District noted in *Brown v. Brown*, the constructive trust is technically not a trust at all.[37] It is an equitable remedy imposed by the court, providing restitution for one party while preventing the other from being unjustly enriched.[38] Efforts to define a constructive trust are difficult because a narrow tailoring will inevitably exclude situations in which the remedy should be available.[39] Missouri courts have echoed the famous words of Justice Cardozo to describe the rationale of the constructive trust: "A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee."[40] The *Restatement (First) of Restitution* states that a constructive trust arises "[w]here 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."[41]

Plaintiffs seeking a constructive trust bear the burden of establishing facts that will give rise to this remedy.[42] Missouri courts have elevated plaintiffs' burden by requiring "an extraordinary degree of proof" to establish a constructive trust.[43] The Missouri Supreme Court has declared that "[t]he evidence must be so clear, cogent, and convincing as to exclude every rea-

33. Catherine filed a timely notice of appeal but died before oral argument. *Id.* at 913 n.1. Her son Joseph, successor in interest to her property, was substituted as the appellant. *Id.*

34. *Id.* at 916.

35. *Id.* at 919.

36. *Id.* at 918.

37. *Id.* at 916 (citing Schultz v. Schultz, 637 S.W.2d 1, 4 (Mo. 1982) (en banc)).

38. RESTATEMENT (FIRST) OF RESTITUTION § 160 cmt. c, d (1937).

39. 5 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 462, at 302 (4th ed. 1989).

40. Lucas v. Cent. Mo. Trust Co., 166 S.W.2d 1053, 1058 (Mo. 1942) (quoting Beatty v. Guggenheim Exploration Co., 122 N.E. 378, 380 (N.Y. 1919)).

41. RESTATEMENT (FIRST) OF RESTITUTION § 160 (1937).

42. 5 SCOTT & FRATCHER, *supra* note 39, § 462.6, at 327-30.

43. Fix v. Fix, 847 S.W.2d 762, 765 (Mo. 1993).

sonable doubt in the mind of the trial court."[44] Although the rationale of this greater burden has been questioned by at least one preeminent scholar,[45] Missouri law still applies the heightened standard.[46]

The constructive trust existed as a remedy long before the release of the Restatement, but it had limited availability to plaintiffs. In early Missouri cases, courts only granted constructive trusts where the unjustly enriched party had committed fraud.[47] A 1914 decision of the Missouri Supreme Court stated that "fraud, either actual or constructive, is the very foundation" of the constructive trust.[48]

The Missouri Supreme Court waited only a year before adopting the Restatement definition of constructive trust after it was promulgated in 1937.[49] In *Suhre v. Busch*, the court affirmed the earlier line of cases establishing fraud as the basis of a constructive trust.[50] The court then expanded the constructive trust doctrine to include cases where plaintiffs had been deprived of property as a result of the "violation of confidence or faith reposed in another."[51] This expanded rule, however, still required some wrongful conduct on the part of the defendant before a constructive trust could be imposed.[52]

The constructive trust doctrine was revisited by the Missouri Supreme Court in 1955, when it addressed the "many, and somewhat confusing, definitions of a constructive trust." [53] The court conceded that Missouri courts had split between those requiring actual or constructive fraud in cases imposing a constructive trust and those "proceed[ing] upon the theory of unjust enrichment . . . without any proof of fraudulent intent."[54] The court also recognized that the constructive fraud requirement may be "an expression of the idea that a constructive trust may arise in the absence of fraud."[55] The Missouri Court of Appeals for the Western District followed this unjust enrichment theory when it imposed a constructive trust in *McFarland v. Braddy*.[56] In *McFarland*, the court held that a deed mistakenly excluding the wife's name was subject to a constructive trust because it was a "classic case of unjust

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44. *Id.*

45. 5 SCOTT & FRATCHER, *supra* note 39, § 462.6, at 327-30 ("Ordinarily, however, there would seem to be no good reason why such proof should be required.").

46. Brown v. Brown, 152 S.W.3d 911, 920 (Mo. Ct. App. 2005).

47. *See, e.g.*, Parker v. Blakeley, 93 S.W.2d 981, 988 (Mo. 1936); Norton v. Norton, 43 S.W.2d 1024, 1031 (Mo. 1931); Bryan v. McCaskill, 225 S.W. 682, 687-88 (Mo. 1920) (en banc); Ferguson v. Robinson, 167 S.W. 447, 452 (Mo. 1914) (en banc).

48. *Ferguson*, 167 S.W. at 452.

49. Suhre v. Busch, 123 S.W.2d 8, 15-16 (Mo. 1938).

50. *Id.* at 15.

51. *Id.*

52. *Id.*

53. Swon v. Huddleston, 282 S.W.2d 18, 25 (Mo. 1955).

54. *Id.*

55. *Id.* at 26.

56. 560 S.W.2d 259 (Mo. Ct. App. 1977).

enrichment."[57] The *McFarland* court, however, based its decision on a breach of the confidential relationship between husband and wife and did not assert that mistake was a sufficient basis for imposing a constructive trust.[58]

In 1983, the possibility of mistake as a sufficient ground for imposing a constructive trust arose in a footnote in a Missouri decision.[59] In 1990, the court of appeals went a step further, declaring that the constructive trust "became the means for restitution from one unjustly enriched by the mistake of another, even though the mistake was not induced by fraud or misrepresentation."[60] Language that included mistake as a sufficient ground for the imposition of a constructive trust occasionally appeared in Missouri case law[61] until the decision in *Brown v. Brown* explicitly expanded the doctrine. Prior to *Brown*, however, no Missouri cases had unequivocally imposed a constructive trust based solely on mistake.[62]

IV. INSTANT DECISION

A unanimous three-judge panel of the Missouri Court of Appeals for the Western District began by making some general observations regarding constructive trusts.[63] This opening dialogue established, in very broad language, the court's authority to impose a constructive trust as an equitable remedy where one "'has acquired property under such circumstances as make it inequitable for him to retain it.'" [64]

After identifying the basis for its authority, the court assessed the appellant's claim that unjust enrichment was not a sufficient ground to support the imposition of a constructive trust.[65] Quickly refuting this claim, the court

57. *Id.* at 264; *see also* Proffit v. Houseworth, 231 S.W.2d 612 (Mo. 1950).

58. *See McFarland*, 560 S.W.2d at 264.

59. Maize v. Maize, 652 S.W.2d 751, 753 n.3 (Mo. Ct. App. 1983).

60. Petrie v. LeVan, 799 S.W.2d 632, 635 (Mo. Ct. App. 1990) (citing RESTATEMENT (FIRST) OF RESTITUTION § 163 (1937)).

61. *See, e.g.*, Thurnon v. Ludy, 914 S.W.2d 32, 34-35 (in order to impose a constructive trust, the evidence must "show fraud, undue influence, mental incapacity or mistake").

62. The *Brown* court primarily relied on two Missouri decisions as support for a broader interpretation of the constructive trust doctrine. Brown v. Brown, 152 S.W.3d 911, 917-19 (Mo. Ct. App. 2005). However, those decisions do not directly hold that a constructive trust can be imposed where unjust enrichment results solely from a mistake. In *Cole v. Morris*, the court applied the equitable remedy of subrogation in granting restitution, and did not impose a constructive trust at all. 409 S.W.2d 668 (Mo. 1966). In *Proffit v. Houseworth*, the court stated that the omission of the plaintiff's name from the deed constituted constructive fraud, which was a sufficient basis for the constructive trust. 231 S.W.2d 612, 617-18 (Mo. 1950).

63. *Brown*, 152 S.W.3d at 916.

64. *Id.* (quoting Schultz v. Schultz, 637 S.W.2d 1, 4 (Mo. 1982) (en banc)).

65. *Id.*

noted that prior Missouri decisions had adopted the view of the *Restatement (First) of Restitution*, which explicitly states that the constructive trust is an appropriate remedy in the case of unjust enrichment.[66] This view was espoused by the Missouri Supreme Court in 1938[67] and reinforced in 1961, when the court stated that "a constructive trust is an equitable device to prevent injustice, particularly unjust enrichment."[68] Accordingly, the appellant's argument was rejected.[69]

Next, the appellant contended that a constructive trust was proper only if the plaintiff made a showing of fraud or other tortious conduct by the defendant.[70] Agreeing that a constructive trust would be proper in cases where the defendant had committed some wrongful act, the court was not convinced that the wrongful conduct of the defendant was a prerequisite to the remedy.[71] The court cited *Cole v. Morris*[72] as authority rejecting the appellant's position.[73] In *Cole*, an injured employee collected benefits from an injury fund and also recovered from a third-party tortfeasor, thereby collecting twice on the same injury.[74] Even though the employee had not acted wrongfully, the Missouri Supreme Court imposed a constructive trust and returned the money to the treasurer of the injury fund to prevent the employee from being unjustly enriched.[75] The *Brown* court relied on *Cole*, concluding that "it is not necessary that the unjustly enriched party be found to have engaged in legal wrongdoing."[76] The court indicated its intent that constructive trusts can be applied in a broad range of circumstances, stating that the constructive trust is a "fluid, flexible device which may be employed to remedy many different types of injustice."[77]

The court then rejected the appellant's argument that mistake is insufficient to justify the court's equitable remedy, declaring that "a constructive trust arises where the title to property is acquired through a mistake."[78] The court relied on *Proffit v. Houseworth*,[79] a 1950 Missouri Supreme Court case, to demonstrate this principle.[80] In *Proffit*, the plaintiff claimed that he should

66. *Id.* at 916-17 (citing RESTATEMENT (FIRST) OF RESTITUTION § 160 (1937)).
67. *See* Suhre v. Busch, 123 S.W.2d 8, 15-16 (Mo. 1938).
68. Cohn v. Jefferson Sav. & Loan Ass'n, 349 S.W.2d 854, 858 (Mo. 1961) (citation omitted).
69. *Brown*, 152 S.W.3d at 917.
70. *Id.*
71. *Id.*
72. 409 S.W.2d 668 (Mo. 1966).
73. *Brown*, 152 S.W.3d at 917-18.
74. Cole, 409 S.W.2d at 669.
75. *Id.* at 670-71.
76. *Brown*, 152 S.W.3d at 918.
77. *Id.*
78. *Id.* (quoting 5 SCOTT & FRATCHER, *supra* note 39, § 462.2, at 314-15).
79. 231 S.W.2d 612 (Mo. 1950).
80. *Brown*, 152 S.W.3d at 918-19.

have been included as a purchaser of property despite the fact that his name did not appear on the contract of sale.[81] The *Proffit* court held that a constructive trust should be imposed in favor of the plaintiff even if his name was omitted from the contract by mistake.[82] Based on this holding, the *Brown* court concluded that "mistake is a sufficient ground for the imposition and enforcement of a constructive trust."[83]

The court recognized that their decision expanded prior Missouri case law which established fraud as the foundation of the constructive trust.[84] Citing authority that "reflected this outdated view," the court declared that Missouri courts now recognize that constructive trusts "may be imposed in broader circumstances."[85] While not directly overruling the contrary authority, *Brown* made it clear that a showing of unjust enrichment, whether by fraud, mistake, or otherwise, is a sufficient basis to support the imposition of a constructive trust.[86]

The court concluded that the trial court had not erred in imposing the constructive trust.[87] Echoing Judge Rolf's circuit court order, the court of appeals agreed that Catherine became the sole owner of the property due to the recording error.[88] Catherine's later execution of the beneficiary deed vio-

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81. *Proffit*, 231 S.W.2d at 614.

82. *Id.* at 617. Interestingly, the defendant in *Proffit* also asserted that a constructive trust was only appropriate in cases of fraud or other wrongful conduct. *Id.* Although apparently given the opportunity to overrule that precedent, the court instead declared that the omission of the plaintiff's name constituted "constructive fraud." *Id.*

83. *Brown*, 152 S.W.3d at 919.

84. *Id.*

85. *Id. See, e.g.*, Parker v. Blakeley, 93 S.W.2d 981, 988 (1936) ("fraud is an essential element of [a] constructive trust"); Matlock v. Matlock, 815 S.W.2d 110, 114 (Mo. App. S.D. 1991) ("Constructive trusts are based upon actual or constructive fraud."); Rutledge v. Rutledge, 655 S.W.2d 812, 814 (Mo. App. E.D. 1983) ("Fraud, either actual or constructive, is the essential element for imposition of a constructive trust."); Beck v. Beck, 728 S.W.2d 703, 708 (Mo. App. S.D. 1987) ("[P]laintiff argues that a constructive trust can be imposed even without a finding of fraud or the existence of a confidential relationship. Plaintiff does not, however, cite any case supporting that hypothesis.").

86. *Id.* at 918-19.

> [A]lthough older Missouri cases limited utilization of constructive trusts exclusively to circumstances involving actual or constructive fraud or the violation of a confidential or fiduciary relationship, Missouri courts, led by our Supreme Court, now recognize . . . that they may be imposed in broader circumstances, including where the evidence establishes that due to a mistake, the defendant received property belonging to plaintiff under conditions that in equity the defendant ought not be allowed to retain it.

Id. at 919.

87. *Id.* at 919-20.

88. *Id.* at 919.

lated her duty to John and Pam as "equitable co-owners of the property."[89] The court held that equity required the property be restored to its rightful owners and, thus, affirmed the imposition of the constructive trust.[90]

Finally, the appellant argued that the decision to remedy the recording mistake should be reversed because it was against the weight of the evidence.[91] The court conceded that the burden of proof to establish a constructive trust is considerable,[92] but it held that the plaintiffs had met their burden sufficiently in this case.[93] The appellant relied on Catherine's testimony that the three quitclaim deeds had actually been recorded in the proper order and the fact that Catherine had expressed her intent to be restored as the sole owner of the property.[94] The court was not convinced by this argument because Catherine's testimony was not supported by the facts. If Catherine, John, and Pam had agreed to restore Catherine as the sole owner, only the two quitclaim deeds from John and Pam would be necessary to effectuate that intent.[95] Additionally, the court noted that the one unbiased witness, attorney Kerber, corroborated the plaintiffs' assertion that Catherine intended to transfer title to the property to herself, John, and Pam as joint tenants with right of survivorship.[96] Deferring to Judge Rolf's determination of Catherine's credibility, the court was satisfied that there was substantial evidence to support the imposition of a constructive trust in this case.[97]

Although the court of appeals agreed with the reasoning and the decision of the trial court, the case was remanded so that judgment could be entered to reflect Catherine's death.[98] Affirming the constructive trust, the opinion concluded by advising the trial court to choose an appropriate method by which the constructive trust would be imposed.[99]

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89. *Id.*

90. *Id.* at 919-20.

91. *Id.* at 920.

92. *Id.* "To establish a constructive trust, an extraordinary degree of proof is required. The evidence must be unquestionable in character. The evidence must be so clear, cogent, and convincing as to exclude every reasonable doubt in the mind of the trial court." *Id.* (citing Fix v. Fix, 847 S.W.2d 762, 765 (Mo. 1993) (en banc)).

93. *Id.* at 921.

94. *Id.*

95. *Id.* The third deed from Catherine granting the joint tenancy served no purpose in restoring her as the sole owner of the property. *Id.*

96. *Id.*

97. *See id.*

98. *Id.*

99. *Id.* at 921-22. The court suggested that the constructive trust could be implemented in several ways: compel the trustees to convey the property to John and Pam, revest title in John and Pam by court decree, or cancel Catherine's beneficiary deed and quiet title in John and Pam. *Id.*

V. COMMENT

Although *Brown v. Brown* may be an appropriate step forward for Missouri case law, the court failed to identify and resolve issues that are likely to emerge in the wake of this case. First, in deciding to impose a constructive trust in a case of mistake, the *Brown* decision did not differentiate a gratuitous conveyance from one supported by consideration. Since the outcome of the case may have depended upon this distinction, it is important that practitioners facing a challenge to *Brown* understand the unstated limitations of its holding.

Second, the court erred in concluding that the mistake in recording had any effect on the interests of the parties. In cases where the recording of instruments is alleged to affect interests in land, practitioners should consider the purpose and function of the recording laws before concluding that the order of recordation determines the passage of title. The court's decision in *Brown* demonstrates its ignorance of the recording laws applicable to the case.

The following critique attempts to clarify these issues in order to prevent Missouri practitioners from adopting the *Brown* decision at face value.

A. Conveyance Ineffective Due to Mistake

In *Brown*, the court did not apply the constructive trust to restore the parties to the positions they were in before the transfer.[100] Instead, Catherine's children sought the constructive trust to compel her to carry out her original gratuitous intention in conveying the property.[101] As explained by leading scholars:

> In this situation there is more difficulty in the way of imposing a constructive trust. Where property is conveyed by mistake, the grantor seeks to restore the status quo by compelling the grantee to make a reconveyance. Where by mistake there is a failure to convey property, the grantee seeks to compel the grantor to carry out his original intention. In the one case the attempt is made to put the parties in the position in which they were before the mistake was made; in the other case the attempt is made to put the parties in the position not where they were before the mistake was made but where they would have been if no mistake had been made.[102]

Ultimately, if John and Pam had paid consideration for their mother's ineffective conveyance, they would have unquestionably been entitled to a

100. *See generally id.*

101. *See id.*

102. SCOTT & FRATCHER, *supra* note 39, § 466, at 343. Amazingly, the *Brown* court cited to the very same section and page of the treatise where this language is found, yet the court ignored this distinction in resolving the case. *Brown*, 152 S.W.3d at 918.

constructive trust.[103] Where the failed conveyance is gratuitous, however, the donee cannot ordinarily compel the donor to complete the intended gift by making an effective conveyance.[104] This is true because the donor is not unjustly enriched at the expense of the donee. Rather, the donor has simply failed to make the intended gift.

Similarly, because Catherine's conveyances to John and Pam were gratuitous, she was not unjustly enriched by the failed conveyances. Catherine had previously been the sole owner of the property and had received no consideration for the transfer to her children. Thus, when Catherine was restored as the sole owner (due to the reverse recording of the three quitclaim deeds), she received no benefit at the expense of John and Pam.[105] In other words, she was not unjustly enriched. Without unjust enrichment, "there is no ground for imposing upon [her] a duty to carry out [her] generous intention."[106] The *Restatement (First) of Restitution* provides additional support for this view: "[I]f the owner of property makes a gratuitous conveyance of it to another and the conveyance is ineffective to transfer the property, the owner continues to hold the property for his own benefit and no constructive trust arises."[107]

The *Brown* decision did not draw this distinction, nor did the court even consider whether any consideration was given in exchange for the conveyance. It appears that Catherine was merely trying to pass the property to her children upon her death.[108] The opinion provides no indication that either John or Pam paid any consideration to their mother for this benefit. In fact, given Catherine's penchant for executing deeds, there is doubt as to whether she had any legal understanding of how her interest in the property was af-

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103. SCOTT & FRATCHER, *supra* note 39, § 466, at 343.

> Where a conveyance of land is made for consideration, and by mistake the conveyance is ineffective to transfer the land . . ., the grantee is entitled to reformation of the deed. In such a case the grantor holds the land, which was intended to be conveyed, upon a constructive trust for the grantee.

Id.

104. *Id.* at 344. "It is accordingly well settled that where the owner of land makes a gratuitous conveyance of the land that is ineffective to transfer it, he may continue to hold the land free of trust." *Id.*

105. John and Pam might have argued that they gave up their present interests in the land by executing the quitclaim deeds as consideration for their mother's promise to reconvey the property to all three of them equally as joint tenants. However, assuming that those initial conveyances were also gratuitous, John and Pam have not suffered any real expense, and Catherine has not been unjustly enriched by being restored to her original position as sole owner.

106. SCOTT & FRATCHER, *supra* note 39, § 466, at 344.

107. RESTATEMENT (FIRST) OF RESTITUTION § 164 cmt. a (1937).

108. The fact that all of Catherine's transfers included a right of survivorship coupled with her later execution of the beneficiary deed supports this conclusion. *See* Brown v. Brown, 152 S.W.3d 911, 915 (Mo. Ct. App. 2005).

fected by all of these transfers.[109] Since all of Catherine's conveyances were probably gratuitous, the court should not have granted the constructive trust without further evidence that John and Pam had paid consideration for Catherine's transfer. The proper disposition would have been a remand to the trial court for further evidence on the issue of consideration.

B. Delivery and Recording of the Deeds

Amidst all the discussion of constructive trusts in *Brown v. Brown*,[110] the Missouri Court of Appeals entirely ignored what should have been the dispositive issue in the case: did the alleged mistake in recording the deeds have any effect on the interests of the parties? Without any analysis, the court decided that it did: "the result of the order of the filing of the deeds was that Catherine held the property in fee simple absolute."[111] The court failed to consider whether the deeds in this case had been properly delivered, and if so, how the later error in the order of recording would affect the valid deliveries.

A valid deed becomes effective and passes title at the moment it is delivered from the grantor to the grantee.[112] Traditionally this occurs when the deed is handed over to the grantee, but a physical passing of the document is not required to establish a delivery of the deed.[113] The delivery is a "question of the grantor's intent."[114] If the grantor did not intend to transfer the interest, then there is no conveyance even where the deed has been physically passed to the grantee.[115] Likewise, if the grantor so intends, there can be a valid delivery and title may pass even though the deed remains in the grantor's possession.[116] Additionally, a deed may be delivered through an agent of the grantee, so long as the proper intent exists in the grantor.[117]

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109. Based on Catherine's conveyances to John in 1989 and Pam in 1997, followed by the decision to restructure the title, *id.* at 914, it seems evident that Catherine did not initially comprehend the legal ramifications of the deeds she had granted. Evidence suggests, however, that Kerber advised Catherine of her rights with respect to the property at the time Kerber prepared the three deeds. *Id.* at 914.

In fact, if Catherine lacked legal understanding of the interests that she had initially passed to John and Pam and those conveyances were gratuitous, Catherine would likely be entitled to restitution in accord with whatever her intentions were at the time of those conveyances. *See* RESTATEMENT (FIRST) OF RESTITUTION § 49 cmt. a, illus. 4 (1937).

110. 152 S.W.3d 911.

111. *Id.* at 915.

112. *See* STOEBUCK & WHITMAN, *supra* note 13, § 11.3, at 828 (3d ed. 2000).

113. *Id.* If the grantee takes possession "it generally raises a strong presumption of delivery, while nondelivery is presumed if the grantor retains possession." *Id.*

114. *Id.*

115. *Id.* at 832.

116. *Id.* at 828.

117. *Id.* at 832.

Missouri has long recognized that title to land passes at the time the deed is delivered.[118] Early decisions of the Missouri Supreme Court confirm that manual delivery to the grantee is not required, and that delivery to a third person is sufficient where evidence shows the grantor's intent to transfer title.[119] Some of these early decisions emphasize that the grantor must part with "all dominion and control" over the deed.[120] Although this language appears to be inconsistent with the principle that the grantor can retain possession of the deed and still make a valid delivery, courts continue to use the language in recent decisions.[121] Remarkably, in *LeMehaute v. LeMehaute*,[122] the Missouri Court of Appeals for the Western District upheld delivery of a deed still in the grantor's possession while affirming that the "dominion and control" over the deed must pass from the grantor to the grantee.[123] The *LeMehaute* decision relied on the recording of the deed as presumptive evidence of delivery, even though the grantor retained possession of the instrument.[124]

Additionally, acceptance of a deed by the grantee is generally required to complete the delivery and transfer title.[125] While Missouri law recognizes this requirement, acceptance is generally presumed unless there is contrary evidence.[126] This presumption places the burden of proof on the party alleging the lack of delivery of the deed.[127] Missouri courts also presume accep-

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118. *See* Klatt v. Wolff, 173 S.W.2d 933 (Mo. 1943) ("[D]elivery gives the instrument force and effect."); Barth v. Haase, 139 S.W.2d 1058, 1061 (Mo. 1940) ("Delivery is the crowning act in the complete execution of a deed . . . ."); Seibel v. Higham, 115 S.W. 987, 990 (Mo. 1908) ("Delivery . . . is the final act that consummates the deed."); Parsons v. Parsons, 45 Mo. 265, 268-69 (1870) ("A valid deed, once delivered, has the effect of vesting the title in the grantee.").

119. *Seibel*, 115 S.W. at 990; Hall v. Hall, 17 S.W. 811, 812-13 (Mo. 1891).

120. Dallas v. McNutt, 249 S.W. 35, 36 (Mo. 1923); Sneathen v. Sneathen, 16 S.W. 497, 499 (Mo. 1891); *see* Standiford v. Standiford, 10 S.W. 836, 838 (Mo. 1889).

121. Rhodes v. Hunt, 913 S.W.2d 894, 900 (Mo. Ct. App. 1995); *see* Meadows v. Brich, 606 S.W.2d 258, 260 (Mo. Ct. App. 1980).

122. 585 S.W.2d 276 (Mo. Ct. App. 1979).

123. *Id.* at 279-80.

124. *Id.* at 279.

125. STOEBUCK & WHITMAN, *supra* note 13, § 11.3, at 832.

126. *See, e.g.*, Pollock v. Brown, 569 S.W.2d 724, 734 (Mo. 1978) (en banc); Ragan v. Ragan, 445 S.W.2d 825, 826-27 (Mo. 1969) (en banc).

127. Cleary v. Cleary, 273 S.W.2d 340, 346 (Mo. 1954). This is true where one party seeks to invalidate a deed based upon a lack of delivery. A party claiming title under a deed, however, may be required to establish that the deed was delivered. Reasor v. Marshall, 221 S.W.2d 111, 116 (Mo. 1949); *see* Turner v. Mallernee, 640 S.W.2d 517, 519 (Mo. Ct. App. 1982); Meadows v. Brich, 606 S.W.2d 258, 260-61 (Mo. Ct. App. 1980). These cases generally involve a deed that has not been recorded and is not in the grantee's possession. *See Turner*, 640 S.W.2d at 519; *Meadows*, 606 S.W.2d at 261; *Reasor*, 221 S.W.2d at 116-17. This shift of the burden of proof is consistent with the rule announced in *Galloway v. Galloway*: "The burden of proof in

tance in cases where the transfer is beneficial to the grantee, and since a grant of land is typically beneficial, the presumption is common.[128] The recording of a deed, which establishes a prima facie case for delivery,[129] also creates a presumption in favor of acceptance.[130]

In *Brown*, the trial court found that the intent of the parties was to place title to the property in Catherine, John, and Pam as joint tenants with right of survivorship.[131] Kerber had prepared three deeds to accomplish that result.[132] On September 30, 1999, Catherine and Pam went to Kerber's office, executed their two deeds, and left them with Kerber.[133] The deeds could not be deemed delivered at that point because the two deeds by themselves would not have accomplished the intentions of the parties. In other words, since neither of the grantors intended the deeds to be delivered without the third deed having been executed, the grantor's intent was insufficient to constitute delivery.

On November 1, 1999, John went to Kerber's office, executed the third deed, and left it with Kerber.[134] At this point, Kerber had possession of all three executed deeds, and each of the parties had left his or her deed with Kerber intending that it be delivered in the proper order. Each party had parted with control over the deed by leaving it with Kerber to be recorded. Therefore, at the time Kerber sent the deeds to be recorded, each deed had already been delivered as intended by the parties. Since title passes at the time of delivery and the deeds had been delivered as intended by Catherine, John, and Pam, title to the property had already passed according to the intention of the parties prior to the deeds ever being recorded.

After determining that title has passed at the time of delivery, the next question is whether the reverse order of recording could affect the interests of the parties. This inquiry requires an examination of Missouri's recording act.[135] The Missouri Supreme Court has declared that the "general and basic purpose" of the recording act is to provide "a system of statutory priorities for the protection of subsequent purchasers of land."[136] Missouri has adopted the

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any case rests upon the party, plaintiff or defendant, who . . . asserts the affirmative of an issue." 169 S.W.2d 883, 888 (Mo. 1943).

128. Wilkie v. Elmore, 395 S.W.2d 168, 172 (Mo. 1965).

129. *Ragan*, 445 S.W.2d at 826.

130. *See* Deer v. King, 30 S.W.2d 980, 982 (Mo. 1930). This rationale is apparent if acceptance is considered an element of a valid delivery, a proposition for which there is substantial authority. *See, e.g.*, *Wilkie*, 395 S.W.2d at 172 ("[A]cceptance necessary to delivery.").

131. Brown v. Brown, 152 S.W.3d 911, 915 (Mo. Ct. App. 2005).

132. *Id.* at 914.

133. *Id.* at 915.

134. *Id.*

135. MO. REV. STAT. §§ 442.380-.400 (2000).

136. Dreckshage v. Cmty. Fed. Sav. & Loan Ass'n, 555 S.W.2d 314, 319 (Mo. 1977) (citing 6 POWELL ON REAL PROPERTY ¶ 913 (1977)). Nearly all of the recording acts currently used in the United States only serve to protect subsequent bona fide purchasers of

"notice" type of recording act, which protects the subsequent bona fide purchaser who takes title without actual notice of a prior unrecorded instrument.[137] A bona fide purchaser is defined by Missouri case law as "one who pays valuable consideration, has no notice of the outstanding rights of others and who acts in good faith."[138]

Specifically, the Missouri recording statute provides that "[n]o such instrument in writing shall be valid, *except between the parties thereto*, and such as have actual notice thereof, until the same shall be deposited with the recorder for record."[139] As one Missouri court has noted, the "recording act is not based upon the priority of recording of two conflicting conveyances, but instead is based upon notice."[140] Because the purpose of the recording act is to protect subsequent purchasers of real estate by ensuring that the public record accurately reflects the passage of title, the act is inapplicable to cases such as *Brown*, where the recording affects only parties to the transaction or those who have actual notice.[141] Since Catherine, John, and Pam were all

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land. STOEBUCK & WHITMAN, *supra* note 13, § 11.10, at 879. For further discussion of the types of recording statutes used in the United States, see *id.* § 11.9, at 871-74.

137. Obernay v. Chamberlin, 506 S.W.2d 446, 449 (Mo. 1974) (en banc).

138. Landshire Food Serv., Inc. v. Coghill, 709 S.W.2d 509, 513 (Mo. Ct. App. 1986) (citing J.C. Equip., Inc. v. Sky Aviation, Inc., 498 S.W.2d 73, 76 (Mo. Ct. App. 1973)).

139. MO. REV. STAT. § 442.400 (2000) (emphasis added).

140. Henson v. Wagner, 642 S.W.2d 357, 360-61 (Mo. Ct. App. 1982) (citation omitted).

141. *See* Harrison v. Moore, 199 S.W. 188, 189-90 (Mo. 1917), which states:

> It should also be remembered that the recording act was designed to have the record of land titles to carry absolute verity upon its face, except in the two instances mentioned, namely, between the parties to the deed and all others who have actual notice of the existence of the unrecorded deed; so, in all other cases where the record is fair upon its face, persons who purchase real estate relying upon that fact acquire a good title against the world, and before that title can be defeated it must be shown that such purchaser was either a party to the unrecorded deed or that he had actual notice thereof, and the burden of proving those facts rests upon those who claim under the unrecorded instrument, as will be shown by the authorities to be presently considered; otherwise, the record of land titles would be of but little, if any, benefit to any one in purchasing real estate.

Id. Additionally, "one seeking to avoid an unrecorded instrument must not only subsequently purchase, but must pay a valuable consideration." *Henson*, 642 S.W.2d at 361. A valuable consideration requires that "[t]he purchase price, or a substantial part of it, must be paid." *Id.* at 362 (citation omitted) (quotation marks omitted). It is unnecessary to determine whether John and Pam paid any valuable consideration to Catherine for her conveyance, since their notice of the instruments prior to recording would deny them protection as bona fide purchasers. However, their failure to pay consideration for the transfer would also bar John and Pam from asserting any rights as bona fide purchasers. "Obviously donees do not qualify" for bona fide purchaser status. STOEBUCK & WHITMAN, *supra* note 13, § 11.10, at 879.

parties to the transaction and all had actual notice of the deeds to be recorded, the recording statute would do nothing to alter the interests conveyed by the parties at the time the deeds were delivered.

The *Brown* decision did not properly consider the purpose or function of Missouri's recording act. The court did not suggest that either John or Pam were subsequent purchasers taking without notice of those instruments. In fact, the evidence conclusively demonstrated that both John and Pam had actual notice of the instruments to be recorded. Since John and Pam were not bona fide purchasers to whom the recording act would be applicable, the order in which the deeds were recorded had no effect on the passage of title at the time of delivery.

Ultimately, to reach the proper conclusion, the Missouri court of appeals merely had to affirm the trial court's determination of the intention of the parties at the time the deeds were executed. Since the deeds were delivered in the proper order, Catherine had effectively transferred the property to herself, John, and Pam as joint tenants with right of survivorship despite the recording error. The court reached the proper outcome in *Brown*, but should have done so by analyzing the purpose and effect of the parties' intentions and the recording act. This analysis would have left the court without any reason to misconstrue the constructive trust doctrine.

VI. CONCLUSION

For the moment, it appears that the Missouri court of appeals has opened the doors of the courthouse a little wider for plaintiffs seeking equitable relief in the form of a constructive trust. However, the distinction between a gratuitous conveyance and one supported by consideration should eventually result in a limitation on the broad holding of *Brown v. Brown*.[142] A limited expansion of the constructive trust doctrine that would protect those paying consideration in cases of mistake is a positive step forward for Missouri case law.

In addition to identifying this limitation, this Note has exposed the pitfalls of ignoring the effect of Missouri's recording act.[143] The recording act has a limited effect in protecting subsequent bona fide purchasers of land. In cases where title to property is allegedly affected by the order in which deeds are recorded, the operation of the recording act is vital in determining the interests of the parties. The failure to recognize the purpose and function of the recording act resulted in an unnecessary expansion of the constructive trust doctrine in *Brown*. Fortunately for the plaintiffs in this case, that fault did not prevent the court from reaching the proper outcome.

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142. *See* discussion *supra* Part V.A.
143. *See* discussion *supra* Part V.B.