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RECENT DEVELOPMENTS

PROPERTY—TENANCY BY THE ENTIRETY—RESULTING TRUSTS—PROOF OF AN AGREEMENT BETWEEN THE TENANTS HELD SUFFICIENT TO REBUT GIFT PRESUMPTION AND ESTABLISH RESULTING TRUST IN FAVOR OF PURCHASING SPOUSE, *ENSOR V. ENSOR*, 270 Md. 549, 312 A.2d 286 (1973).

Despite an increasing divorce rate, many American couples continue to conduct financial and property transactions with the optimistic assumption that their marriage will prevail. For example, married persons who desire to share their individual assets with their spouse often place their property in a tenancy by the entirety,[1] which enables them to alleviate personal liability risks, and also facilitates estate settlement at the death of either spouse. Problems arise, however, if marital bliss diminishes, divorce proceedings are commenced, and the spouses request the return of their financial investments in the marriage. The parties to the recent Maryland case of *Ensor v. Ensor*[2] found themselves in this situation.

Mrs. Ensor used her separate funds to provide the down payment for a house deeded to her husband and herself as tenants by the entirety. The money involved was the proceeds from a judgment which awarded her damages for injuries suffered in an accident.[3] The couple was later divorced, whereupon Mrs. Ensor brought an action against her former

1. "A tenancy by the entirety is an estate held by husband and wife as a unity . . . and may exist . . . in any interest in land which may be owned by the marital unity subject to survivorship." 2 AMERICAN LAW OF PROPERTY § 6.6, at 23 (A. J. CASNER ed. 1952. The estate by the entirety differs from the joint tenancy in that neither party has an individual interest which he can convey. Any conveyance must be executed by both parties jointly. Thus the right of survivorship of one party cannot be defeated by the action of the other. *Id.* at 27. In many jurisdictions it is held that neither spouse has any specific interest which he can encumber, or which a creditor can attach for satisfaction of a debt. *Id.* at 29. Maryland is among these jurisdictions. *See, e.g.*, Annapolis Banking and Trust Co. v. Neilson, 164 Md. 8, 164 A. 157 (1933). *See generally* Masterman v. Masterman, 129 Md. 167, 98 A. 537 (1916), for a discussion of the tenancy by the entirety in Maryland. Personal property, as well as realty, may be held by the entirety in this state. *See, e.g.*, Beard v. Beard, 185 Md. 178, 44 A.2d 469 (1945).

   Some jurisdictions do not recognize the estate by the entirety. *See, e.g.*, Faye v. Smiley, 201 Iowa 1290, 207 N.W. 369 (1926); Farmers and Merchants' Bank v. Wallace, 45 Ohio St. 952, 12 N.E. 439 (1887); Helvie v. Hoover, 11 Okla. 687, 69 P. 958 (1902). Others have held that statutes abolishing joint tenancies or rights of survivorship, or raising a rebuttable presumption of a tenancy in common as to concurrent estates, apply to estates by the entirety. *See, e.g.*, First Nat'l Bank v. Lawrence, 212 Ala. 45, 101 So. 663 (1924); Swan v. Walden, 156 Cal. 195, 103 P. 931 (1909); Wilson v. Wilson, 43 Minn. 398, 45 N.W. 710 (1890). But the Maryland cases of Masterman v. Masterman, 129 Md. 167, 98 A. 537 (1916); Brewer v. Bowersox, 92 Md. 567, 48 A. 1060 (1901); and Marburg v. Cole, 49 Md. 402 (1878), indicate that MD. ANN CODE Real Prop. Art., § 2-117 (1974), which creates a presumption against a joint tenancy, has no application to a tenancy by the entirety.
2. 270 Md. 540, 312 A.2d 286 (1973).
3. *See* Ensor v. Ortman, 243 Md. 81, 220 A.2d 82 (1966), for an account of the incident in which the damages were recovered.

husband for sale in lieu of partition[4] of the property. After the decree of sale, she filed a claim asserting that she had invested her money in the realty under an agreement with her husband wherein he would recognize her contribution as her sole and separate property and would return it to her in the future as she might desire.[5]

At the equity proceedings, the testimony of Mrs. Ensor's sister substantiated this assertion. The sister said that she was present in the Ensor home when the couple discussed what to do with Mrs. Ensor's award from the judgment. She stated that Mr. Ensor acknowledged in her presence that the money belonged to his wife. She further testified that the couple agreed to preserve the money for Mrs. Ensor's future medical care, since her injuries from the accident might require additional treatment. The couple then decided on an investment in real estate as the best way to provide for this possibility, she said.[6]

The chancellor was impressed with the sister's testimony as compared with that of Mr. Ensor, as well as with the fact that Mrs. Ensor's requirements for future medical care provided a sound reason for the agreement.[7] He found that the parties had made an agreement that Mrs. Ensor's contribution to the purchase of the property was an investment in trust for her ultimate use and benefit.[8] Consequently, he held that the presumption of a gift normally arising when a wife pays for property conveyed to her husband and herself as tenants by the entirety had been rebutted, and a resulting trust had been established in Mrs. Ensor's favor.[9] A decree was accordingly issued which entitled Mrs. Ensor to the return of her down payment from the proceeds of the sale of the property and to one half of the remaining balance.[10]

In affirming the decree, the Maryland Court of Appeals rendered, for the first time, a decision declaring a resulting trust in favor of a wife of funds she had invested in property which was placed, with her consent, in a tenancy by the entirety.[11]

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4. It is generally held in Maryland that when a decree of absolute divorce makes no disposition of property held in a tenancy by the entirety the spouses become tenants in common of such property. *See, e.g.*, Brucker v. Benson, 209 Md. 247, 121 A.2d 230 (1956); Meyers v. East End Loan and Sav. Ass'n, 139 Md. 607, 116 A. 453 (1922). MD. ANN. CODE Real Prop Art., § 14-107 (1974), provides in part that any tenant in common has the right to secure separate enjoyment of his interest either by partition or by sale and division of the proceeds.
5. 270 Md. at 550, 312 A.2d at 287. MD. ANN. CODE art. 45, § 4 (1971) provides that a married woman may hold property for her separate use as though she were not married and has the same power to dispose of it as husbands have to dispose of their property.
6. 270 Md. at 551-52, 312 A.2d at 287-88. *See also* Record at 12-17, Ensor v. Ensor, 270 Md. 549, 312 A.2d 286 (1973).
7. 270 Md. at 550-51, 312 A.2d at 287.
8. *Id.* at 552, 312 A.2d at 288.
9. Record at 32-34, Ensor v. Ensor, 270 Md. 549, 312 A.2d 286 (1973). The chancellor quoted and relied on language from Reed v. Reed, 109 Md. 690, 692-93, 72 A. 414, 415 (1909). *See* p. 165 *infra* for full quotation from *Reed*.
10. 270 Md. at 552, 312 A.2d at 288.
11. The Maryland courts had previously held that the presumption of a gift in this situation could only be rebutted by proof of fraud or undue influence, *see* p. 168 *infra*.

The court held:

> [I]f it is established that one spouse furnished the consideration for the purchase of real estate and if it is further established that the land was conveyed to husband and wife as tenants by the entireties under an agreement or understanding between husband and wife that the real and exclusive ownership should be in the spouse furnishing the consideration, the title of that spouse will be protected.[12]

While the court accepted the view that a presumption of a gift arises when property is purchased by a wife and deeded to both spouses as tenants by the entirety,[13] it rejected Mr. Ensor's contention that the presumption could be rebutted only by proof of fraud or undue influence.[14] Instead the court indicated that the presumption could also be negated by evidence of the wife's intention to retain the entire beneficial interest.[15] The court accepted the chancellor's finding that there was an agreement between Mr. and Mrs. Ensor that her investment in the property was an investment in trust,[16] and deemed it sufficient to rebut the gift presumption.[17] Furthermore, the court indicated, when the presumption of a gift fails under these circumstances, the appropriate theory for relief lies in the application of the doctrine of resulting trusts,[18] and thereby implicitly rejected the view of some authorities that a constructive trust should be imposed.[19]

Resulting trusts and constructive trusts are, respectively, implied and imposed by the courts, in appropriate circumstances, to compel a person holding legal title to property to surrender the property to another. The result is basically the same as would ensue under an express trust.[20] A constructive trust arises when a person holding title to property would be unjustly enriched if allowed to retain it.[21] In the words of Justice Cardozo: "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 con-

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12. 270 Md. at 562, 312 A.2d at 293.
13. The court cited, among others, the Maryland cases of McCally v. McCally, 250 Md. 541, 243 A.2d 538 (1968); Anderson v. Anderson, 215 Md. 483, 138 A.2d 880 (1958) and Gunter v. Gunter, 187 Md. 228, 49 A.2d 454 (1946), to this effect. 270 Md. at 554-58, 312 A.2d at 288-90.
14. 270 Md. at 556-57, 312 A.2d at 290-91.
15. *Id.* at 561, 312 A.2D at 292-93, citing Rayher v. Rayher, 14 N.J. 174. 101 A.2d 524 (1953).
16. *Id.* at 562-63, 312 A.2d at 294.
17. *Id.* at 561, 312 A.2d at 292-93.
18. *Id.* at 561-62, 312 A.2d at 293.
19. Costigan, *The Classification of Trusts*, 27 HARV. L. REV. 437 (1914).
20. *See* G. AND G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES §§ 451-71 (2d ed. 1964) [hereinafter cited as BOGERT]; 5 A. SCOTT, THE OF TRUSTS §§ 404.2, 462.1 (3d ed. 1967 [hereinafter cited as SCOTT], for a discussion of resulting and constructive trusts.
21. BOGERT § 471; 5 SCOTT § 462.

verts him into a trustee."[22] A resulting trust arises in favor of one who has transferred or caused property to be transferred to another when the circumstances surrounding the conveyance raise an inference that the transferor intended to convey bare legal title only, and had no intention of also giving up the beneficial interest.[23] The major distinction between the two is that a constructive trust arises without regard to the intention of the person who transferred the property, while the existence of a resulting trust is dependent on that person's intention.[24]

Although it is the true intention of the person who has paid for the property which governs whether a resulting trust exists, the courts have created presumptions as to this intention. The circumstances surrounding the conveyance are held to raise the inference that a resulting trust in favor of the payor was intended, or conversely, that the payor's intention was to make a gift to the person in whom the legal title is vested. An understanding of these presumptions is essential since the parties to the litigation have the burden of presenting evidence sufficient to overcome a presumption unfavorable to their cause.[25]

The development of the presumptions regarding the payor's intention parallels the evolvement of the doctrine of resulting trusts. This doctrine had its genesis in the labyrinthal land conveyances of Medieval England. At that time, land was commonly held in the name of one person although another was entitled, by the express terms of the conveyance, to its beneficial use.[26] When one person paid for property and placed the title in a legal stranger, without also expressly giving the stranger the beneficial use of the property, the courts naturally inferred: (1) That the purchaser intended to follow the usual practice of placing the title to the land in one person and the beneficial use in another;[27] and, (2) Since one normally expects to obtain property and services for money paid out, that the purchaser probably intended to keep the beneficial use for himself, not having expressly given it to anyone else.[28] The courts accordingly decided that the gratuitous transferee held the land upon a resulting use, or in trust, for the person

22. Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 386, 122 N.E. 378, 380 (1919).
23. 5 Scott § 404.1.
24. Bogert § 451; 5 Scott §§ 440.1, 462.1.
25. Bogert § 454.
26. Bogert § 453; 5 Scott § 404.

> Before that Statute [of Uses] there were three kinds of uses called resulting:
> (1) The typical resulting use was the one held to result where A., a fee simple owner, made a feoffment to B. and his heirs; But B. gave no consideration, and A. declared no use in favor of B. or of any one else.
> (2) Another kind of resulting use was that which existed where A. paid the purchase money for a conveyance of land by B. and had B. make a feoffment in fee of the land to C., who was legally a stranger to A.
> (3) Closely akin to the first kind of resulting use was the use found to exist where A. made the feoffment to B. and his heirs to the use of or in trust to C. for life or on some other use which did not purport to dispose of the whole beneficial interest or on a use which failed for some reason to take effect and B. gave no consideration.
> Costigan, *The Classification of Trusts*, 27 Harv. L. Rev. 437, 439-40 (1914).

27. Bogert § 454, at 513; 5 Scott § 440, at 3309.
28. See, for an explanation of this rationale, *In re* Estate of Mahin, 161 Iowa 459, 143 N.W. 420 (1913); Howe v. Howe, 199 Mass. 598, 85 N.E. 945 (1908); Harvey v. Ledbetter, 48 Miss. 95 (1873); Aborn v. Searles, 18 R.I. 357, 27 A. 796 (1893).

who had paid for it. Since the use or trust was not expressly declared, but reverted to the person who had paid for the land as a result of the circumstances surrounding the conveyance, it was called a resulting use or trust.[29]

This practice provided the model for the modern purchase money resulting trust. When the circumstances surrounding a conveyance indicate no intention on the part of the person who has paid for property to make a gift to the person in whom he placed the title, a purchase money resulting trust is presumed in most jurisdictions,[30] including Maryland.[31] Since this trust arises by implication of law, the Statute of Frauds is not applicable and it may be proved by parol evidence.[32] The person seeking to establish the resulting trust must first prove that he paid for the property. Since the presumption, being one of fact, is rebuttable, he must also overcome any evidence presented to show that a gift was intended.[33]

29. BOGERT § 454, at 515–16; 5 SCOTT § 404, at 3212.

30. BOGERT § 454, at 513; 5 SCOTT § 404, at 3310. *See, e.g.*, Nasaroff v. National Union Fire Ins. Co., 104 Cal. App. 551, 286 P. 486 (Dist. Ct. App. 1930); Shea v. Venuti, 346 Mass. 780, 195 N.E.2d 532 (1964); Sanders v. Sanders, 357 Mo. 881, 211 S.W.2d 468 (1948).

The justification for this presumption in our time has been doubted. *See, e.g.*, J. AMES, LECTURES ON LEGAL HISTORY 431, 434 (1913); Ames, *Breach of Express Oral Trust of Land*, 20 HARV. L. REV, 549, 555–57 (1907). Even these authorities point out, however, that a statutory or otherwise conclusive presumption *against* a purchase money resulting trust is even less justifiable. Purchase money resulting trusts of land have been abolished in some states by statute. *See, e.g.*, KY. REV. STAT. § 381.170 (1969); MINN. STAT. ANN. §§ 501.07–.09 (1947); N.Y. ESTATES, POWERS AND TRUSTS LAW § 7-1.3 (McKinney 1967).

31. *See, e.g.*, Miller v. Miller, 101 Md. 600, 61 A. 210 (1905); Dryden v. Hanway, 31 Md. 254 (1869).

32. Bogert notes that in the case of Anonymous, 2 Vent. 361 (1683), decided shortly after the adoption of the Statute of Frauds, Chancery held that a purchase money resulting trust was not within the seventh section of the Statute. BOGERT § 452, at 503. Additionally, Bogert states that:

> In the United States, wherever express trusts of realty are required to be manifested or proved by writing, there is a section or clause corresponding to the eighth section of the English Act excepting resulting trusts. No matter what the particular wording of these excepting clauses, the courts have been unanimous in holding that they were to cover all resulting and constructive trusts. *Id.* at 504.

See, e.g., Fasman v. Pottashnick, 188 Md. 105, 51 A. 664 (1947); Mutual Fire Ins. Co. v. Deale, 18 Md. 26 (1861) for Maryland cases holding that resulting trusts are not required to be in writing.

However, as was pointed out in Battle v. Allen, 250 Md. 672, 675, 245 A.2d 590, 591 (1968): "Parol evidence may be sufficient to establish a resulting trust but the court will view it with great caution because it impeaches a document executed according to law and recorded as evidence of title."

33. *See* BOGERT § 454, at 520; 5 SCOTT § 441, at 3326; *id.* § 458, at 3399. *See generally* Vogel v. Vogel, 157 Md. 147, 145 A. 370 (1929), for authority that the person attempting to establish a resulting trust must prove that he paid the purchase price. *See also* Mountford v. Mountford, 181 Md. 212, 29 A.2d 258 (1942); Powell v. McKenzie, 137 Md. 266, 112 A. 290 (1920); Dixon v. Dixon, 123 Md. 44, 90 A. 846 (1914), as to the rebuttability of a resulting trust.

One point of contention in *Ensor* was whether Mrs. Ensor had met her burden of proof to establish a resulting trust. The court mentioned that a stringent test must be met before evidence may be deemed sufficient to establish a resulting trust, but upheld the chancellor's findings, pointing out his opportunity to observe the demeanor of the witnesses. 270 Md. 549, 563, 312 A.2d 286, 293–94. *Ensor* thus sets no specific standards for the form of agreement or understanding which must be proved to establish a resulting trust, but gives the chancellor wide discretion.

The converse inference, that the payor intended to make a gift of the property to the person holding legal title, arises when the latter is related to the payor by blood or marriage in such a way that he is a "natural object" of the payor's bounty. The essential question is whether the payor and donee share a relationship such that it would be natural for the payor to make gratuitous provisions for the donee.[34] According to one authority, the difficulty in applying this principle is that:

> So much depends not upon the formal relationship between the parties but upon their attitudes to each other. It is true that the rules adopted by the courts with respect to the various relationships do not necessarily determine the final result, since they lay down presumptions which may be rebutted by further evidence. The presumptions, however, are given undue weight. Indeed, in some decisions it has been stated that they can be rebutted only by very strong, clear or even inclusive or indubitable evidence. Such a rule clearly gives too great weight to the relationship between the parties. The question is really one of intention as shown by all the circumstances. The notion that intention can be determined by the application of hard and fast rules of law is common in primitive systems of law, but it tends to disappear as courts and lawyers become more sophisticated.[35]

Nevertheless, the majority of jurisdictions,[36] including Maryland,[37] hold that when a husband purchases property and places it in the name of his wife a gift is presumed. When a wife purchases property in the name of her husband, the general rule is that a resulting trust is presumed.[38] The distinction is made on the basis of the traditional social and economic roles of the husband and wife.[39] Some jurisdictions,[40] however, including Maryland,[41] presume a gift where the wife has paid for the property on the basis of her moral duty to help her

34. BOGERT § 459, 5 SCOTT § 442. *See also* Weisberg v. Koprowski, 17 N.J. 362, 111 A.2d 481 (1955) for discussion of criterion.
35. 5 SCOTT § 442, at 3340.
36. *See, e.g.*, Fry v. National Savings and Trust Co., 289 F. 589 (D.C. Cir. 1923); Altramano v. Swan, 20 Cal. 2d 622, 128 P.2d 353 (1942); Williams v. Thomas, 200 Ga. 767, 38 S.E.2d 603 (1946); Sigel v. Sigel, 238 Mass. 587, 131 N.E. 316 (1921).
37. *See, e.g.*, Mountford v. Mountford, 181 Md. 212, 29 A.2d 258 (1942); Powell v. MacKenzie, 137 Md. 266, 112 A. 290 (1920).
38. *See, e.g.*, Keaton v. Pipkins, 43 F.2d 497 (10th Cir. 1930); McKinnon v. McKinnon, 181 Cal. App. 2d 97, 5 Cal. Rptr. 43 (1960); Hegel v. Hegel, 248 So. 2d 212 (Fla. App. 1971); Glover v. Waltham Laundry Co., 235 Mass. 330, 127 N.E. 420 (1920). *But see* Tenczar v. Tenczar, 332 Mass. 105, 123 N.E.2d 359 (1954); Bingham v. National Bank of Montana, 105 Mont. 159, 72 P.2d 90 (1937); and cases cited in notes 40–42 *infra* for authority contra.
39. BOGERT § 459, at 579–86; 5 SCOTT § 442, at 3340.
40. Adkins v. Lee, 23 Conn. Super. 1, 175 A.2d 716 (1961); Hogan v. Hogan, 286 Mass. 524, 190 N.E. 715 (1934); Bingham v. National Bank of Montana, 105 Mont. 159, 72 P.2d 90 (1937); Whitten v. Whitten, 70 W.Va. 422, 74 S.E. 237 (1912).
41. *See* McCally v. McCally, 250 Md. 541, 243 A.2d 538 (1968); Reed. v. Reed, 109 Md. 690, 72 A. 414 (1909); Jenkins v. Middleton, 68 Md. 540, 13 A. 155 (1888); Farmers and

husband, the mutual affection presupposed between spouses, or a distaste for the presumption of a debtor-creditor relationship between husband and wife.[42]

An additional circumstance affecting whether a presumption of a gift or a presumption of a resulting trust is declared by the court occurs when the purchaser of property places the title in another person and himself as tenants in common, joint tenants or tenants by the entirety. The very fact that the payor has expressly retained an interest for himself has been held by some courts to raise the presumption that he intended to make a gift of an undivided interest in the property to the other tenant.[43] The basis for this inference is that, ordinarily, there would be no purpose in including the other party's name on the deed unless to vest in him such interest as the conveyance on its face imported.[44] Certainly the inference of a gift should be strengthened by this additional circumstance when the other party to the tenancy is a "natural object" of the bounty of the purchaser.

When a wife is the purchaser of property which is placed in a tenancy by the entirety, the courts take three different positions on the presumption applicable. The difference between these positions is apparently a result of the courts' differing opinions as to whether or not the husband is a "natural object" of the wife's bounty. Thus some courts presume a resulting trust in favor of the wife if there is no evidence that the husband was intended to have a beneficial interest.[45] Others presume a gift to the husband of an undivided interest and the right of survivorship unless there is evidence of a different intention of the wife.[46] The third position holds that a gift to the husband is established.[47]

Whenever the presumption of a gift from the wife is employed, the

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Merchants' Nat'l Bank v. Jenkins, 65 Md. 245, 3 A. 302 (1886); Taylor v. Brown, 65 Md. 366, 4 A. 888 (1886).

42. See, for general discussion of this point, 24 COL. L. REV. 325; 37 HARV. L. REV. 921; 16 ILL. L. REV. 529. For Maryland authority as to the rationale, see, *e.g.*, Grover & Baker Sewing Mach. Co. v. Radcliff, 63 Md. 496 (1885); Edelin v. Edelin, 11 Md. 415 (1857).
43. *See, e.g.*, Trimble v. Coffman, 114 Cal. App. 2d 618, 251 P.2d 81 (1952); Mitchell v. Carrell, 321 Mass. 453, 73 N.E.2d 832 (1947); Honeycutt v. Citizens Nat'l Bank, 242 N.C. 734, 89 S.E.2d 598 (1955). *See also* RESTATEMENT (SECOND) OF TRUSTS § 441, comment *e* (1959) (quoted at p. 170 *infra*).
44. BOGERT § 460, at 601–02; 5 SCOTT § 441.4.
45. *See, e.g.*, Keen v. Larsen, 132 N.W.2d 350 (N.D. 1964) and cases in North Carolina where, largely by force of statute, a trust for the wife generally results, *e.g.*, Wilson v. Ervin, 227 N. C. 396, 42 S.E.2d 468 (1947); Kelly Springfield Tire Co. v. Lester, 190 N. C. 411, 130 S.E. 45 (1925); Deese v. Deese 176 N. C. 527, 97 S.E. 475 (1918).
46. *See, e.g.*, Lux v. Hoff, 47 Ill. 425 (1868); Eagle v. McKown, 105 W. Va. 270, 142 S.E.65 (1928); Wilber v. Wilber, 312 S.W.2d 86 (Mo. 1958). The RESTATEMENT (SECOND) OF TRUSTS also takes this view. See § 441, comment *e*, cited at p. 170 *infra*. However, statutes abolishing resulting trusts may defeat the wife's claim even though the real understanding was that the land should belong to her alone. *See, e.g.*, Schmitz v. Wenzel, 166 Minn. 435, 208 N.W. 184 (1926).
47. *See, e.g.*, Jones v. Wright, 230 Ark. 567, 323 S.W.2d 932 (1959); Fergueson v. Stokes, 269 S.W.2d 655 (Mo. 1954); Legendre v. South Carolina Tax Comm'n, 215 S.C. 514. 56 S.E.2d 336 (1949).

courts exhibit a strong tendency to protect her from the undue influence or fraud which might be practiced upon her by her husband. If evidence shows that the presumed gift was elicited under these circumstances, a constructive trust is declared in order to prevent the unjust enrichment of the husband.[48]

A complication occurs in any case where the court has presumed a gift and the payor attempts to rebut the presumption with evidence that the payor and donee had orally agreed that the property was to be held in trust for the payor. The argument has been advanced that the oral agreement constitutes an attempted express trust, which is invalid under the Statute of Frauds.[49] This proposition is generally rejected on the basis of the rationale which was articulated by the Supreme Court in the landmark case of *Smithsonian Institution v. Meech*:[50]

> The existence of an express agreement does not destroy the resulting trust . . . . [I]t was an agreement prior to the vesting of title—an agreement which became a part of and controlled the conveyance, and evidence of its terms is offered, not for the purpose of establishing an express trust, but of nullifying the presumption of an advancement, and to indicate the disposition which the real owner intended should be made of the property.[51]

The Court further determined that since a resulting trust is always presumed when one party pays for land conveyed to another, the presumption is merely pushed into the background when there is proof of a relationship between the payor and transferee sufficient to give rise to a presumption of a gift. Thus, when the gift presumption is later rebutted with evidence of an agreement by the transferee to hold as trustee for the payor, the original presumption of a resulting trust re-emerges as the proper remedy.[52] Other authorities, while agreeing that an oral agreement should not prevent enforcement of the trust, argue that the original presumption of a resulting trust can have no vitality after the inference of a trust has given way to demonstration of an express trust, through proof of a parol agreement. Instead, they contend that a constructive trust should be imposed on the person who attempts to unfairly retain the beneficial interest in property he has promised to hold in trust for the payor.[53]

Obviously a conflict over the beneficial ownership of property which

48. *See, e.g.*, LeCain v. Becker, 58 So. 2d 527 (Fla. 1952); Bell v. Bell, 210 Ga. 295, 79 S.E.2d 524 (1954). *See also* Manos v. Papachrist, 199 Md. 257, 86 A.2d 474 (1952); Beard v. Beard, 185 Md. 178, 44 A.2d 469 (1945); Livingston v. Hall, 73 Md. 386, 21 A. 49 (1891).

49. *See, e.g.*, Smithsonian Institution v. Meech, 169 U.S. 398 (1898); Carillo v. O'Hara, 400 Ill. 518, 81 N.E.2d 513 (1948); Liberty Trust Co. v. Hayes, 244 Mass. 251, 138 N.E. 582 (1923).

50. 169 U.S. 398 (1898).

51. *Id.* at 409.

52. *Id.* at 408–10.

53. Costigan, *supra* note 19.

was paid for by one spouse and conveyed to both spouses as tenants by the entirety requires the resolution of several intricate legal questions. Should a resulting trust be presumed in favor of the spouse who furnished the consideration? Should the converse inference of a gift arise due to the close relationship of the parties and the fact that the payor has retained a portion of the beneficial interest? Should the presumption vary according to whether the paying spouse is the husband or the wife? What should be the burden of proof required to overcome the selected presumption? If the gift presumption is employed, should evidence of an oral agreement that the non-paying spouse was to hold in trust for the paying spouse be allowed to rebut the presumption? If the paying spouse proves such an agreement, what form should the remedy take—a resulting trust or a constructive trust?

The facts of *Ensor v. Ensor* provided the court of appeals with an opportunity to articulate the Maryland position on these issues. Although the court looked to another jurisdiction for persuasive analysis,[54] it clearly indicated[55] that it found a strong basis for its decision in the earlier Maryland case of *Reed v. Reed.*[56]

In *Reed*, a wife brought a bill of complaint asking that a decree declare her to be the sole owner of land which was conveyed to her and her husband as tenants by the entirety on a consideration that she furnished.[57] The court said:

> It has been repeatedly held by this court that if a wife gives to her husband property belonging to her or her separate estate, or permits him to apply it to his own use, or he does so with her knowledge and consent, *in the absence of proof that it was given to him to be held in trust for her use*, or of a promise by the husband at the time to repay it, it will be presumed that it was intended as an absolute gift to him, and she has no claim therefor against him or his estate.[58]

Since the only allegation in Mrs. Reed's bill was that she had paid for the property,[59] there was no basis for a trust, and the court thereby inferred that she had intended a gift.[60] Mrs. Reed, however, brought evidence to show that her husband used undue influence to induce her to convey the property to them as tenants by the entirety, although her bill of complaint did not allege this.[61] Citing Maryland authority that a gift from a wife to her husband should be examined for evidence that

54. 270 Md. 540, 561, 312 A.2d 286, 292 (1973) where the court referred to Rayher v. Rayher, 14 N.J. 174, 101 A.2d 524 (1953), as "persuasive."
55. 270 Md. at 553-56, 312 A.2d 289-91.
56. 109 Md. 690, 72 A. 414 (1909).
57. *Id.* at 691-92, 72 A. at 414.
58. *Id* at 692, 72 A. at 415 (citations omitted), emphasis added where it was later added by the *Ensor* court.
59. *Id.* at 692, 72 A. at 414-15.
60. *Id.* at 694, 72 A. at 415.
61. *Id.* at 694-95, 72 A. at 415.

the gift was obtained through fraud or undue influence and that it would not be upheld under those conditions,[62] the court remanded the case in order that the bill could be amended and the parties given an opportunity to offer additional evidence on this point.[63]

Before *Reed*, Maryland decisions on this issue had involved situations where a husband had used or appropriated the personal property of his wife with her consent.[64] In these cases, the courts declared that when a wife's funds had been used by her husband with her acquiesence, she would have no claim against him or his estate unless he had made a promise to repay,[65] to treat the money as her separate estate,[66] or to invest it for her use.[67] For example, in *Tyson v. Tyson*,[68] the court concluded that a gift had been made by a wife to her husband, after noting specifically that the evidence did not show that a loan or trust was created between them. Additional earlier Maryland decisions had expressly stipulated that the presumption of a gift may in any case be rebutted by evidence manifesting a clear intention that the donee was to take as trustee.[69]

The *Reed* court clearly relied on these cases which presumed a gift when a wife's personal property was conveyed to or appropriated by her husband, and, by employing their rationale, extended it, along with the attendant exceptions, to apply to the situation where a wife used her funds to purchase real property in the names of her husband and herself as tenants by the entirety. This reasoning process was actually a condition precedent to the action taken by the court in first presuming the intention to make a gift, and then remanding the issue to the court below for the presentation of further evidence relative to fraud or undue influence.

Various texts, authorities and cases in other jurisdictions have cited *Reed* as authority for the proposition that the presumption of a gift may be upheld only in the absence of proof establishing a contrary intent.[70] However the Maryland decisions preceding *Ensor* appeared to ignore the underlying rationale of *Reed* and instead apparently interpreted the case solely on the basis of the final action taken by the court.[71] An understanding of the interpretation which the intervening

62. *Id.* at 695–96, 72 A. at 416.
63. *Id.* at 696, 72 A. at 416.
64. *See, e.g.*, Jenkins v. Middleton, 68 Md. 540, 13 A. 155 (1888); Farmers and Merchants' Nat'l Bank v. Jenkins, 65 Md. 245, 3 A. 302 (1886); Taylor v. Brown, 65 Md. 366, 4 A. 888 (1886); Kuhn v. Stansfield, 28 Md. 210 (1868); Edelin v. Edelin, 11 Md. 415 (1857).
65. Farmers and Merchants' Nat'l Bank v. Jenkins, 65 Md. 245, 3 A. 302 (1886); Kuhn v. Stansfield, 28 Md. 210 (1868); Edelin v. Edelin, 11 Md. 415 (1857).
66. Farmers and Merchants' Nat'l Bank v. Jenkins, 65 Md. 245, 3 A. 302 (1886).
67. *Id.*
68. 54 Md. 35 (1880).
69. *See, e.g.*, Mutual Fire Ins. Co. v. Deale, 18 Md. 26 (1861), the landmark Maryland case on this point.
70. Haguewood v. Britain, 273 Mo. 89, 199 S.W. 950 (1917); 41 AM. JUR. 2d, *Husband and Wife* § 95, at 96 (1968); Annot., 43 A.L.R.2d 917 (1955).
71. See discussion in this casenote at pp. 167–68 *infra*, and other cases which have cited *Reed* as authority for the proposition that the gift presumption prevails unless there is

cases imputed to *Reed* is therefore essential to an understanding of the effect of *Ensor* on Maryland law.

Although earlier cases[72] alluded to *Reed*, it was in *Gunter v. Gunter*,[73] thirty-eight years later, that the Maryland court first explicated its interpretation of *Reed* with reference to the presumption of a gift. In *Gunther*, the court stated, in dictum, that *Reed* stood for the proposition that: "[I]n the absence of fraud or undue influence, the courts will not inquire into the contributions of the parties [to a tenancy by the entirety] prior to the joint acquisition . . . ."[74] Subsequently, in *Anderson v. Anderson*,[75] referring to the down payment a wife had made on property conveyed to herself and her husband as tenants by the entirety, the court said, citing *Reed*: "In legal effect, and in the absence of proof that it was not her voluntary act, this transaction on its face amounted to an absolute gift."[76] Both these statements from *Gunter* and *Anderson* were then quoted in *McCally v. McCally*,[77] in which the court rejected a husband's contention that a presumed

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evidence of fraud or undue influence, *e.g.*, Brell v. Brell, 143 Md. 443, 122 A. 635 (1923); Lewis v. Lewis, 140 Md. 524, 118 A. 65 (1922).

72. *See, e.g.*, Young v. Diedel, 141 Md. 670, 119 A. 448 (1922); Braecklin v. Braecklin, 139 Md. 341, 115 A. 118 (1921); Beggs v. Erb, 138 Md. 345, 113 A. 881 (1921); Equitable Ice Co. v. Moore, 127 Md. 322, 96 A. 444 (1915), which cited *Reed* on the issue of whether a case may be remanded for further hearing on evidence of a complaint not alleged in the original bill. Other cases cited *Reed* as authority for the proposition that a tenancy by the entirety is converted into a tenancy in common on a divorce *a vinculo*. *See, e.g.*, Blenard v. Blenard, 185 Md. 548, 45 A.2d 335 (1946); Crise v. Smith, 150 Md. 322, 133 A. 110 (1926); Meyers v. East End Loan & Sav. Ass'n, 139 Md. 607, 116 A. 453 (1922); Masterman v. Masterman, 129 Md. 167, 98 A. 537 (1916); Nihiser v. Nihiser, 127 Md. 451, 96 A. 611 (1916). Additional cases cited *Reed* as authority for the proposition that proof of fraud or undue influence may negate the gift. Beard v. Beard, 185 Md. 178, 44 A.2d 469 (1945); Hall v. Hall, 180 Md. 353, 24 A.2d 415 (1942); Tillinghast v. Lamp, 168 Md. 34, 176 A. 629 (1935); Hillwood v. Hillwood, 159 Md. 167, 150 A. 286 (1930). *See also* cases cited note 71 *supra*.

73. 187 Md. 228, 49 A.2d 454 (1946).

74. *Id.* at 231, 49 A.2d at 456. The court reversed the chancellor's denial of a divorced husband's request for partition by sale of a leasehold property, formerly held by him and his wife as tenants by the entirety, because he was in default on alimony payments. There was no allegation by either party that one had contributed more than the other toward the purchase of the property. The court also cited Brell v. Brell, 143 Md. 443, 122 A.2d 633 (1923), which had cited *Reed* on another point, as authority for the quoted statement. Neither *Brell* nor *Reed* use this language, nor does an examination of either case reveal any inference of such a broad proposition.

75. 215 Md. 483, 138 A.2d 880 (1958).

76. *Id.* at 488–89, 138 A.2d at 883. The wife in *Anderson* claimed that she was entitled to the return of her money because it constituted an investment in a business in which she said she was a partner with her husband. The business had been dissolved. The court said that, regardless of a partnership, nothing in the partnership act would prevent the partners from agreeing on the title of specific assets and held that a gift had been made to the husband of an interest in the tenancy by the entirety. However, the *Anderson* court concluded its decision by stating: "Starting with the presumption of a gift . . . [w]e cannot find that the chancellor was clearly wrong in finding no intention to change the legal title to the premises from a tenancy by the entireties to some other form of ownership." *Id.* at 489, 138 A.2d at 884. Other Maryland cases citing *Reed* for the proposition that this transaction constitutes an absolute gift in the absence of fraud or undue influence have also continued to discuss the intention of the donor elsewhere. *See, e.g.*, Lewis v. Lewis, 140 Md. 524, 527, 118 A. 65, 66 (1922).

77. 250 Md. 541, 544–45, 243 A.2d 538, 540–41 (1968).

"gift" to his wife of her interest in property which he had bought and placed in a tenancy by the entirety was actually conditioned on her fidelity and on the continuation of their marriage. The husband asserted that the property should be returned to him since he had been granted a divorce on the grounds of adultery.[78] Although the husband in *McCally* was attempting to establish a constructive trust, it is apparent from the language used by the court that a resulting trust would also have been rejected.[79]

In each of these three cases, the court ignored the trust exception set out by the *Reed* court to the presumption of a gift and apparently construed *Reed* to stand for the narrow proposition that *only* proof of fraud or undue influence could rebut the presumption. A justification for this narrow construction of *Reed* cannot be found in the facts of the interpreting cases.[80] Rather, it appears, these cases, and those which subsequently followed this construction,[81] failed to take note of the language in *Reed* to the effect that the gift presumption arises only in the absence of circumstances indicating a contrary intention. The *Ensor* court, however, took specific note of this "underlying premise" of *Reed*, and affirmed its validity.[82] *Ensor* thus adopted the majority view[83] that the presumption of a gift may also be negated by evidence that the spouse who paid for the property had a contrary intention.[84]

78. The husband in *McCally* also argued that public policy should dictate that an adulterous spouse should not be unjustly enriched as a result of his or her culpable conduct. Where property is held by the entirety and the wrongdoing spouse had not contributed to the purchase of the property, he contended, the court should impress upon the interest of the wrongdoer a constructive trust in favor of the innocent party after the couple was divorced *a vinculo*. *Id.* at 545, 243 A.2d at 540. This doctrine of divestiture of the culpable spouse has been adopted in some jurisdictions. *See, e.g.*, Moore v. Moore, 278 F. 1017 (D.C. Cir. 1922), where the court said:

> [T]he husband must be supposed to have given and the wife to have accepted with the implied condition that the property should not be used ... for the maintenance of one who had ... repudiated him as a husband; that the real consideration of such a conveyance was marriage and the continuance of the married state, which failed when by such an act the relation was rendered intolerable. *Id.* at 1018 (citations omitted).

79. 250 Md. at 548, 243 A.2d at 542.

80. *See* text at notes 74-79 *supra*.

81. *See, e.g.*, Hardy v. Hardy, 250 F. Supp. 956, 961 (D.D.C. 1966), where the court cited *Reed, Anderson;* Brell v. Brell, 143 Md. 443, 122 A. 635 (1923), which had also cited *Reed* for the following statement:

> [U]nder Maryland law, absent a showing of fraud, coercion, misrepresentation or undue influence at the time of the transaction, placing title in a tenancy by the entirety works as an absolute gift to the non-paying spouse of an equal interest.

Only one Maryland case, Burleigh v. Miller, 209 Md. 57, 120 A.2d 378 (1956), has previously quoted the entire statement from *Reed* which is quoted at p. 165 *supra*. There the court did not find *Reed* to be applicable since the parties involved were a married man and his paramour, not a married couple. However, in one case occurring after *Reed*, the court ruled that an initial presumption of a resulting trust in favor of the wife would arise where her money was used to purchase land in her husband's name alone. *Reed* was not mentioned. Dixon v. Dixon, 123 Md. 44, 90 A. 846 (1914).

82. 270 Md. at 554, 312 A.2d at 289.

83. *See* Annot., 43 A.L.R.2d 917, § 5, at 926 (1955).

84. 270 Md. at 554, 312 A.2d at 289.

The *Ensor* court's interpretation of *Reed* is clearly at variance with the interpretation given to the case by the *Gunter*, *McCally* and *Anderson* courts.

The *Ensor* court reconciled its position with that of *Anderson* by pointing out that other language in the *Anderson* case implied that on a proper state of facts a finding could have been made that there was no intention by the wife to make a gift.[85] *Ensor* attempted to distinguish *Gunter* and *McCally*, but whether it accomplished this is questionable. The court said:

> We do not understand these cases as having rejected the resulting trust theory. *Gunter* and *McCally* are not in conflict with our holding here when our concern is not the respective contributions of the parties, but the question of title in accordance with the understanding of the parties at the time of the conveyance . . . .[86]

This distinction is ambiguous. While the *Gunter* and *McCally* courts did not explicitly reject the resulting trust theory, they certainly implied as much by stating that they would not inquire into the respective contributions of the parties to a tenancy by the entirety in the absence of proof of fraud or undue influence.[87] It is obviously impossible for a complainant to successfully assert a resulting trust unless the court allows him to prove his contribution to the estate.[88] The distinction is further rendered implausible because of the fact that the *Ensor* court was, despite its statement to the contrary, manifestly concerned with the "respective contributions of the parties" since Mrs. Ensor had to prove not only that she intended to retain the beneficial title to the property, but also that she made the down payment.

The question arises as to the extent to which the *Gunter* and *McCally* decisions are affected by the *Ensor* court's inability to reconcile the interpretations those cases gave to *Reed* with its own. The *Gunter* holding is not adversely affected, since that case mentioned *Reed* only in dictum, and its facts provided no basis for a resulting trust.[89] The reasoning of the *McCally* decision, however, which relied solely on a narrow interpretation of *Reed*, is obviously undermined by the *Ensor* rationale.[90] Future decisions dealing with the issues raised in *McCally*

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85. *Id.*
86. *Id.*, 312 A.2d at 291.
87. *See* pp. 167–68 *supra*, discussing *Gunter* and *McCally*.
88. *See* p. 160 *supra*.
89. *See* note 74 *supra*.
90. The *McCally* court's sole authority for its rejection of the husband's contention that he had made a conditional gift to his wife of her interest in a tenancy by the entirety, and that the condition had been broken, was its indirect reliance on *Reed*, via *Gunter* and *Anderson*. *See* p. 167 *supra*. It is unclear whether the McCally court merely spoke too expansively or whether it actually misinterpreted these cases when it stated that the law in Maryland was that the courts would not inquire into the contribution of the parties to a tenancy by the entirety prior to their joint acquisition unless fraud or undue influence

should, therefore, logically be based on another rationale,[91] even though the *Ensor* court clearly intended to note that *McCally* is still good law.[92]

The *Ensor* court augmented its rationale for finding a resulting trust in its reference to *Rayher v. Rayher*,[93] a New Jersey case. Therein, a wife who had been given some property as a wedding gift placed it in a tenancy by the entirety, at her husband's suggestion, to facilitate its management. The husband orally promised to relinquish his interest if his wife requested. The property was then sold, the husband quitclaiming[94] his interest, and other property was bought with the proceeds and also placed in a tenancy by the entirety. When the couple was later divorced, the court returned the property to the wife, basing its decision on the following language from the Restatement (Second) of Trusts, which it interpreted as establishing an exception to the presumption of a gift:

> The fact that the payor takes title to property in the name of himself and another jointly is an indication of an intention of the payor to make a beneficial gift of an undivided interest in the property to the other person; and *in the absence of evidence of a different intention of the payor*, the other person does not hold his interest upon a resulting trust for the payor.[95]

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was proved, and that in the absence of such proof, an absolute gift would be presumed. Regardless of this, the interpretation of *Reed* which the *McCally* court derived, and its reliance thereon, is inconsistent with the *Ensor* court's reliance on *Reed* in establishing resulting trust in Mrs. Ensor's favor on the basis of the agreement between the couple.

91. It would be contradictory for the Maryland courts to now resort to a narrow interpretation of *Reed* to reject a contention by a spouse who has paid for property held in a tenancy by the entirety that the "gift" was subject to a condition, if both husband and wife understood and agreed to the condition. Such an agreement might, however, be distinguishable from the type of agreement made by Mr. and Mrs. Ensor, especially if the agreement might be construed as one made in contemplation of divorce. Generally, provisions in antenuptial contracts regarding the disposition of property in the event of divorce are held to be contrary to public policy and void. I. BAXTER, MARITAL PROPERTY § 26.1, at 393 (1973). Some courts would likely strike down such agreements in postnuptial contracts on the same grounds, although an argument could be made that the public policy rationale should not be invoked as strongly against contracts made after marriage.

    In at least two cases the courts have refused to declare a resulting trust in favor of a spouse who made a conditional gift to the other spouse when the condition was not met. *See* Brod v. Brod, 390 Ill. 312, 61 N.E.2d 675 (1945), Coffman v. Coffman, 414 S.W.2d 305 (Mo. 1967). *But see* Porter v. Porter, 168 Md. 287, 177 A. 460 (1935), where a husband alleged that he had conveyed land to his wife with the understanding that each would make a will leaving their entire property to the other, and that his wife had subsequently destroyed her will to defeat the agreement. The court found that the wife had not destroyed her will, and thus rejected the husband's content that a resulting trust should be declared in his favor. The court did not, however, reject the theory of the bill.

92. *See* p. 169 *supra*, for language used by the *Ensor* court.

93. 17 N.J. 174, 101 A.2d 524 (1953).

94. "A release or acquittance given to one man by another, in respect of any action that he has or might have against him. Also acquitting or giving up one's claim or title." BLACK'S LAW DICTIONARY 1417 (4th ed. 1968).

95. 17 N.J. at 181–83, 101 A.2d at 528–29. The quoted language is from THE RESTATEMENT (SECOND) OF TRUSTS § 441, comment *e* with the *Rayher* court's emphasis added.

The *Ensor* court stated that it found *Rayher* persuasive and in accord with its own previous decision in *Bowis v. Bowis*.[96] Although the *Bowis* case involved the separate securities of a wife which were placed in a joint account, the Maryland Court of Appeals had similarly held that the property "did not represent a jointly held asset of the parties as the husband had never contributed anything toward the purchase . . . nor had the wife ever made a gift to him of any interest . . ."[97] The position taken by the court in *Ensor*, which involved realty, is thus compatible with its holding in *Bowis*, which concerned personal property,[98] its previous language in *Reed*,[99] and the Restatement (Second) of Trusts.[100] It is interesting to note that this view implies that when there is evidence that a gift was not intended, the presumption of a gift does not arise, despite the fact that the parties share a relationship which would normally raise such a presumption.

This position correlates with the *Ensor* court's finding of a resulting trust, as opposed to a constructive trust, in the wife's favor. Recognizing the fine line which sometimes divides the two, the court found the question of "title in accordance with the understanding of the parties . . . [to be] allied with our previous pronouncements relative to fraud and undue influence."[101] In addition, the court referred to *Schwarz v. United States*,[102] a federal case arising in Maryland, which suggested that the circumstances of a particular case may sometimes give rise to either a constructive or resulting trust. In *Schwarz*, a wife had purchased property with her separate funds and placed the realty in a tenancy by the entirety. It was revealed later that the husband was legally married to another woman at the time of the conveyance. The court declared a resulting trust in the second wife's favor, stating:

> Whether the trust be considered a trust resulting to the wife because of the failure of the purpose of the conveyance and of her having furnished the purchase money, or as a constructive trust raised in her favor because of the fraud practiced upon her as to the marital status of her husband, we think there can be no doubt that the equitable title to the property was in her . . . .[103]

There is Maryland authority for finding a constructive trust on facts analogous to those in *Ensor*.[104] The *Ensor* court, however, having

96. 259 Md. 41, 267 A.2d 84 (1970).
97. *Id.* at 45, 267 A.2d at 86.
98. *Id.* at 41, 267 A.2d at 84.
99. 109 Md. at 692, 72 A. at 415.
100. *See* p. 170 *supra*.
101. 270 Md. at 557, 312 A.2d at 291.
102. 191 F.2d 618 (4th Cir. 1951).
103. *Id.* at 623.
104. *See* Leupold v. Leupold, 156 Md. 516, 144 A. 647 (1929). There a husband alleged that he had conveyed property held by his wife and himself as tenants by the entirety to her name alone on an agreement that she would divide the property equally, which she later

accepted the Restatement (Second) of Trusts position that the presumption of a gift arises in the absence of a contrary intention of the spouse who paid for the property, logically concluded that a resulting trust is re-established once the contrary intention is shown. Not only is this the more generally accepted rationale,[105] but, despite the contrary authority,[106] it would also seem to require less circuitous reasoning than that required to establish a constructive trust. As outlined previously, the establishment of a constructive trust necessitates the extinction of all presumptions and a showing of unjust enrichment.[107]

CONCLUSION

Neither the basic rationale nor the holding of the *Ensor* court is surprising; both are in accord with established legal principles. The action taken by the court is consistent with the fundamental premise of the law of gifts and trusts that the intention of the parties is of primary importance.[108] It affirms that valid agreements between husband and wife regarding their respective rights in property constitute evidence of their intentions and are enforceable under modern contract and property law.[109] The decision reiterates the generally accepted view that a purchaser's intent to retain the beneficial interest of property he has placed in another's name will be given effect through the implication of a resulting trust.[110]

The *Ensor* court merely applied these principles, for the first time in Maryland, to a conflict over the beneficial ownership of property which was purchased by one spouse and placed in a tenancy by the entirety. The language and rationale of previous Maryland cases, other than *Reed*, had created the erroneous impression that such circumstances would raise an absolute presumption of a gift, rebuttable only by proof that the gift was fradulently induced. The significance of *Ensor* is that it repudiated this narrow concept by holding that once Mrs. Ensor established her intent to retain the entire beneficial interest in the property, she was entitled to a resulting trust. The *Ensor* decision reflects the view of the majority of jurisdictions which have dealt with this situation.[111] In dictum, the court indicated that the interest of a

refused to do, claiming a gift had been made. The court held that if it were proved that the wife had procured the title from her husband on a subsequently repudiated promise to divide the property equally, a ground was constituted upon which a constructive trust could be declared and enforced.

105. *See* BOGERT § 461, at 619.

106. *See* Costigan, note 19 *supra*.

107. *See* BOGERT § 495 for a general discussion of the rationale for establishing a constructive trust under these circumstances.

108. *See, e.g.*, Beard v. Beard, 185 Md. 178, 44 A.2d 469 (1945); Hutson v. Hutson, 168 Md. 182, 177 A. 177 (1935).

109. MD. ANN. CODE art. 45, § 20 (1971) provides that a married woman may contract with her husband and sue and be sued as if she were a *femme sole*.

110. *See* note 30 *supra*.

111. *See* note 83 *supra*.

husband who purchases property and places it in a tenancy by the entirety in similar circumstances will also be protected.[112]

The *Ensor* case also has a more general relevance. When viewed in the light of other recent cases[113] involving the property rights of divorced spouses, the decision indicates a progressive tendency on the part of the Maryland courts to give increased weight to agreements between the husband and wife and other circumstances in their marriage as evidence of their intentions in property transactions. The court has apparently begun to recognize that many married people no longer adopt their traditional social and economic roles, and that time-worn presumptions of intent predicated on these roles should not always prevail.

The result of *Ensor* is to allow husbands and wives to place their separate property in a tenancy by the entirety to facilitate its management, to lessen their personal financial liability, and to avoid some of the costs of estate settlement if their relationship continues harmoniously until the death of one spouse. In the event of a divorce, they may secure the return of their investment if it was made under an agreement that it was to be held in trust. Although some may urge that decisions such as *Ensor* will create a tendency among married persons to use the tenancy by the entirety as a vehicle for fraud upon creditors, or upon each other, the potential is somewhat vitiated by statutory provisions,[114] and the doctrine of equitable estoppel.[115] While many factors should be considered before property is placed in an estate by the entirety,[116] this type of joint ownership is certainly made a more viable option by the *Ensor* decision.

Jana Guy

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112. 270 Md. at 562, 312 A.2d at 293.

113. A good example is Bowis v. Bowis, 259 Md. 41, 267 A.2d 84 (1970), the facts of which are discussed at p. 171 *supra*. Others are Lingo v. Lingo, 267 Md. 707, 299 A.2d 11 (1973), where the courts held that a husband's contribution to a tenancy by the entirety after the couple had separated, but before they were divorced, should be returned to him, and the more recent case of Gosman v. Gosman, 271 Md. 514, 318 A.2d 821 (1974), where the court upheld a finding that a wife was a partner in her husband's business and awarded her fifty per cent of its fair market value.

114. MD. ANN. CODE art. 45, § 1 (1971), provides that a transfer of property from one spouse to another is invalid when it has been made in prejudice of the rights of creditors. The creditors, however, to assert their rights must file claims within three years after the acquisition of the property or be absolutely barred.

115. *See* BOGERT § 463.

116. *See* NYSBA Panel, *Joint Property, Its Virtues and Vices*, 111 TRUSTS AND ES 446 (1972), for a discussion of the advantages and disadvantages of owning property as tenants by the entirety.