FILED
IN THE SUPREME COURT
OF TEXAS
11 July 29 P12:28
BLAKE. A. HAWTHORNE
CLERK

NO. 10-0592

IN THE SUPREME COURT OF TEXAS

JOHN GANIM

Petitioner,

v.

FAROUK (FRANK) ALATTAR

Respondent

On Appeal From The Fourteenth Court of Appeals

AMICUS CURIAE BRIEF
ON MOTION FOR REHEARING
OF THE EPISCOPAL DIOCESE OF FORT WORTH &
THE CORPORATION OF THE EPISCOPAL DIOCESE OF FORT WORTH

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Episcopal Diocese of Fort Worth is a non-profit religious association of more than 50 churches in and around the Fort Worth area. The Corporation of the Episcopal Diocese of Forth Worth holds title to more than $100 million in property under an express trust for the benefit of those churches. Both are among the petitioners in Cause No. 11-0265, *The Episcopal Diocese of Fort Worth, et al. v. The Episcopal Church, et al.*, a direct appeal recently filed in this Court. The direct appeal involves questions surrounding a purported express trust asserted by The Episcopal Church. As the Court's per curiam opinion in this case involves an alleged partnership and does not involve an express trust, the issues in the two cases are different.

But the Diocese and Corporation are concerned by the opinion's suggestion that a claimant to property can plead around the statute of frauds and the Texas Trust Code by asserting nothing but an oral agreement for joint acquisition of land. Can a third party — who has *no* title, *no* signed writing, and *no* money at risk — become owner of real estate simply by convincing a jury that an oral promise of joint ownership was made many years ago? If that is Texas law, then claimants from Rome, Canterbury, or anywhere else might ask a jury to

award interests in Texas church properties based on nothing but oral testimony about "understandings" from long ago. The Court should reconsider whether the per curiam opinion correctly states Texas law.

The Diocese and Corporation have paid all out-of-pocket expenses incurred in the preparation and filing of this Brief. No attorney's fees are being charged by or paid to the undersigned counsel for the same.

I. A 1993 Statute Bars Parol Claims That Property Was Bought for a Partnership

Based on older cases, the per curiam opinion states that an oral agreement to acquire land for a partnership is not barred by the statute of frauds. But the Legislature abrogated that rule in 1993.

Before 1961, partnerships could not hold title to property. "Under the aggregate theory of partnership property, followed by Texas courts, a partnership was not capable of holding title to realty; title had to be in a partner."[1] As a result, even if a partner bought land in his own name and with his own funds, parol evidence was admitted to show that the property was actually intended to be partnership property.[2]

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[1] *Humphrey v. Bullock*, 666 S.W.2d 586, 590 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

[2] *See, e.g., Logan v. Logan*, 138 Tex. 40, 156 S.W.2d 507, 512 (Tex. 1941) ("'Whether or not land taken in the name of one or more partners is in fact partnership property always depends upon the intent of the parties and the understanding and design under which they

In 1961, Texas switched to the "entity theory" of partnership, which allows partnerships to hold title directly.[3] This change *allowed* partnerships to take title, but did not *require* them too. Thus, partnerships were still allowed to assert a parol agreement that property titled to a partner actually belonged to the partnership.

But all that ended in 1993, when Legislature adopted a statutory presumption that property in a partner's name ***does not*** belong to a partnership unless (1) it was bought with partnership funds, or (2) the partnership is expressly disclosed in the deed:

> Property acquired in the name of one or more of the partners, without an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership, and without use of partnership property, is presumed to be the partner's property, regardless of whether the property is used for partnership purposes.[4]

That law continues in effect today as section 152.102(c) of Texas Business Organizations Code:

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acted. It is clear that an express agreement may show this intent; but it may also be established by an implied agreement. This implied agreement may be gathered by considering the general purpose of the parties, the nature of their business, and the manner in which they have dealt with the property in question.").

[3] *Act of March 6, 1961*, 57th Leg., R.S., ch. 158, § 8(3) 1961 Tex. Gen. Laws 289, 291 ("Any estate in real property may be acquired in the partnership name."); *see Cleaver v. Cleaver*, 935 S.W.2d 491, 494 (Tex. App.—Tyler 1996, no writ); *Harris v. Harris*, 765 S.W.2d 798, 802 (Tex. App.—Houston [14th Dist.] 1989, writ denied); *Marshall v. Marshall*, 735 S.W.2d 587, 593-594 (Tex. App.—Dallas 1987, writ ref'd n.r.e.).

[4] *Act of May 30, 1993*, 73rd Leg., R.S., ch. 917, § 1, 1993 Tex. Gen. Laws 3887, 3891 (former Tex. Rev. Civ. Stat. art. 6132b—2.05).

> Property acquired in the name of one or more partners is presumed to be the partner's property, regardless of whether the property is used for partnership purposes, if the instrument transferring title to the property does not indicate the person's capacity as a partner or the existence of a partnership, and if the property is not acquired with partnership property.

The statute does not say whether the statutory presumption is rebuttable. But even if it is, something more than parol evidence must be required — otherwise the Legislature changed nothing by adopting it. Worse, allowing rebuttal based on parol evidence would render the statute circular: a partnership is presumed to have no interest, unless someone *says* the partnership has an interest. The courts cannot construe this statute in a way that renders it completely ineffective.[5]

In this case, the deeds did not describe Alattar as a "partner" or name a partnership. No one but Alattar paid anything for the property. No writing pertaining to the property ever mentioned the partnership, and no writing pertaining to the partnership ever mentioned the property. As a result, by statute Alattar is presumed to be the owner, and Ganim cannot rebut that presumption by parol evidence alone.

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[5] *See* Tex. Gov't Code § 311.021(2); *Farmers Group, Inc. v. Lubin*, 222 S.W.3d 417, 426 (Tex. 2007).

II. A 1943 Statute Bars Parol Claims That Property Was Bought for a Trust

"Before 1943, the law allowed some margin in the enforcement of express oral trusts; but in 1943 the Texas Trust Act terminated that liberality …."[6]

In 1851 in *James v. Fulcrod*, this Court enforced on oral agreement to jointly acquire a town lot in Goliad on the basis that it was not a contract for sale of land but "a trust or confidence in lands."[7] After noting that the statute of frauds in England and in most states barred oral land trusts, the Court held that the Texas statute of frauds did not.[8] Similarly, in 1888 in *Gardner v. Randell* (the case discussed in the per curiam opinion), this Court upheld on oral contract to go halves on a lot in Denison on the basis that "a trust immediately arose":

> Here is an agreement between two parties to buy land jointly. One buys under the agreement, taking a bond for title in his

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[6] *Rankin v. Naftalis*, 557 S.W.2d 940, 944 (Tex. 1977).

[7] 5 Tex. 512, 1851 WL 3915, *3 (1851).

[8] *Id.* at *4-*5 ("But the English statute contains provisions in relation to trusts and confidences in lands by which such agreements as set forth in the petition have been controlled, but which have not been made of force in this State…. These provisions, which have been adopted in most of the States of the United States, prohibit the creation of trusts of lands unless manifested or proved by writing, or unless they result by implication or construction of law; but under our laws, express and implied or constructive trusts, as to their creation, or rather proof, stand upon the same footing. The special contract under which the former are raised, and the facts from which the latter result, may alike be proven and sustained by parol evidence.").

> own name. A trust immediately arose in favor of appellee upon the execution of the bond.[9]

The Court again based its decision on the omission of land trusts from the Texas statute of frauds.[10]

But all that changed when the Texas Trust Act was adopted in 1943, extending the statute of frauds to parol trusts in land:

> Provided, however, that a trust in relation to or consisting of real property shall be invalid, unless created, established, or declared … [b]y a written instrument subscribed by the trustor or by his agent thereunto duly authorized by writing; ….″[11]

The per curiam opinion dismisses the Trust Act on the ground that Ganim never pleaded an express trust. But no one pleaded an express trust in *Gardner* or *Fulcrod* either, only an oral agreement to acquire land jointly.[12] This Court ***implied*** a trust ***because it had to***; that was the only way to save an otherwise naked oral contract for land. Implying

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[9] 70 Tex. 453, 7 S.W. 781, 782 (Tex. 1888).

[10] *Id*. ("Under the English statute of 29 Chas. II., parol trusts could not be created by express agreement; but this provision has not been incorporated into our laws.").

[11] *See* Texas Trust Act § 7 (*formerly* Tex. Rev. Civ. Stat. art. 7425b-7), Act of April 19, 1943, 48th Leg., R.S., ch. 148, § 7, 1943 Tex. Gen. Laws 232, 234 (*currently codified as* Tex. Prop. Code § 112.004).

[12] *See Gardner*, 7 S.W. at 782 ("Here is an agreement between two parties to buy land jointly. One buys under the agreement, taking a bond for title in his own name. A trust immediately arose in favor of appellee upon the execution of the bond"); *Fulcrod*, 1851 WL 3915, *1 ("There was an agreement between two persons to purchase together a lot at public sale").

such a trust was allowed in the 1800s. But with the extension of the statute of frauds in 1943, that avenue has been closed for 68 years.

It is true that the mere designation "trustee" on a deed does not create a trust.[13] But it does not open the door for every business associate or friend of the "trustee" to assert a parol claim to the land. When a person buys property as "trustee" but designates no beneficiary (as here), it becomes a "failed trust."[14] For failed trusts, the rule is that title vests in the person who paid the purchase price, a rule stated in section 423 of the Restatement (Second) of Trusts:

> Where the owner of property transfers it upon a trust which fails, and he receives from the transferee consideration for the transfer as an agreed exchange, there is no resulting trust and ***the transferee holds the property free of trust***.[15]

The San Antonio court of appeals as recently as 2009 cited this section as reflecting Texas law,[16] as did the Texarkana court of appeals in

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[13] *See Nolana Dev. Ass'n v. Corsi*, 682 S.W.2d 246, 249 (Tex. 1984).

[14] *See, e.g., Pickelner v. Adler*, 229 S.W.3d 516, 526 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) ("That is, when an essential term is altogether missing from an attempted express trust, or is not at least reasonably certain, that term cannot be supplied by parol evidence, and the trust will fail.").

[15] Restatement (Second) of Trusts § 423 (1959).

[16] *See Longoria v. Lasater*, 292 S.W.3d 156, 168 (Tex. App.—San Antonio 2009, pet. denied).

1991.[17] The Texas Property Code also recognizes this rule, providing that property conveyed to a "trustee" without identifying any trust or beneficiary can be sold or pledged by the trustee "without subsequent question" by someone claiming to be a beneficiary.[18]

III. Without a Trust or Partnership Claim, There Is No Parol Claim At All

Texas courts have never enforced oral agreements for the joint acquisition of land except in the trust and partnership contexts. The per curiam opinion appears to adopt a general rule approving such agreements regardless of whether a valid trust or partnership is pleaded. This ignores not just the 1943 and 1993 statutes, but the role trusts and partnerships played in the law before those changes.

A partnership agreement can be oral.[19] Trusts for personality can also be oral,[20] and the same was true for realty before 1943.[21] The

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[17] *See Jordan v. Exxon Corp*., 802 S.W.2d 880, 882 (Tex. App.—Texarkana 1991, no writ); *see also Costello v. Hillcrest State Bank of Univ. Park*, 380 S.W.2d 780, 782 (Tex. Civ. App.—Dallas 1964, no writ) (holding conveyance to "Jim Costello, Trustee" did not create a trust, so property was owned by Costello and his wife and subject to their homestead claim).

[18] *See* Tex. Prop. Code § 101.001.

[19] *See, e.g., Young v. Qualls*, 223 S.W.3d 312, 314 (Tex. 2007); *Williams v. Khalaf*, 802 S.W.2d 651, 653 (Tex. 1990).

[20] *See* Tex. Prop. Code § 112.004.

[21] *See Rankin v. Naftalis*, 557 S.W.2d 940, 944 (Tex. 1977) ("Before 1943, the law allowed some margin in the enforcement of express oral trusts; but in 1943 the Texas Trust Act terminated that liberality by the enactment of article 7425b-7."); *accord, Sorrells v. Coffield*, 144 Tex. 31, 187 S.W.2d 980, 981 (Tex. 1945)

statute of frauds governs sales of realty, not formation of entities; thus it does not generally apply to oral agreements to form such entities. So while the statute of frauds requires a written conveyance into the entity, it does not require a writing showing creation of an entity or its owners.

Yet this analysis only works when there is an intervening entity. Without such an entity, title goes to the grantee individually, and any oral agreement to share title is nothing but a parol contract for land. Here, for example, if Alattar did not take the property in trust or on behalf of a partnership, then he took it in his individual capacity; there is simply no other capacity available.[22] As a result, transferring title from Alattar individually to Ganim based on an oral promise is indistinguishable from enforcing an oral contract for land.

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[22] The Trust Code exempts constructive trusts, resulting trusts, and business trusts, *see* Tex. Prop. Code § 111.003, but none apply here. A ***resulting trust*** can arise when title is taken by someone other than the one who paid for it. *See Tricentrol Oil Trading, Inc. v. Annesley*, 809 S.W.2d 218, 220 (Tex. 1991); *Nolana Dev. Ass'n v. Corsi*, 682 S.W.2d 246, 250 (Tex. 1984). Here, Ganim neither took title nor paid for anything . A ***constructive trust*** requires breach of a pre-existing fiduciary relationship. *See Ginther v. Taub*, 675 S.W.2d 724, 725 (Tex. 1984); *Rankin v. Naftalis*, 557 S.W.2d 940, 944 (Tex. 1977). Here, Alattar was Ganim's friend, not his fiduciary. A ***business trust*** may arise when a trust is set up like a corporation, BLACK'S LAW DICTIONARY 1655 (9th ed. 2009) ("business trust. A form of business organization, similar to a corporation, in which investors receive transferable certificates of beneficial interest instead of stock shares. — Also termed Massachusetts trust; common-law trust."); *see, e.g., Thompson v. Schmitt*, 115 Tex. 53, 274 S.W. 554, 559 (Tex. 1925). Here, there is no evidence of that, and in any event the same 1993 statute creating a presumption that partnerships do not own a partner's property would apply to a business trust. *See* Tex. Bus. Orgs. Code § 152.051(b) ("[A]n association of two or more persons to carry on a business for profit as owners creates a partnership, regardless of whether: (1) the persons intend to create a partnership; or (2) the association is called a 'partnership,' 'joint venture,' or other name."); *Ingram v. Deere*, 288 S.W.3d 886, 894 n.2 (Tex. 2009) ("We see no legal or logical reason for distinguishing a joint venture from a partnership on the question of formation of the entity.").

IV. Texas Courts No Longer Enforce Parol Agreements for Joint Acquisition of Land

The per curiam opinion says that "our courts have continued to enforce agreements for the joint acquisition of land, even though legal title is held in the name of one of the partners." But the cases cited all pre-date the statutory changes noted above.

Two of those cases involved partnerships.[23] In neither case did the title deeds give any indication of a partnership,[24] nor did the oral claimant pay for the property. As a result, the 1993 statutory change abrogated these cases, both of which preceded its adoption.

The remaining two cases involved trusts.[25] They both postdate the adoption of the Texas Trust Act in 1943, but the Act's statute of frauds is not addressed in either case.[26] That a court in the distant past overlooked the Trust Act's statute of frauds is no reason to do so now.

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[23] *See King v. Evans*, 791 S.W.2d 531 (Tex. App.—San Antonio 1990, writ denied); *Davis v. Sheerin*, 754 S.W.2d 375 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

[24] *See King*, 791 S.W.2d at 536 ("[T]he name or names under which the deed is recorded is irrelevant to determining whether the land is a partnership asset."); *Davis*, 754 S.W.2d at 386 ("Appellee testified that the reason the deeds were taken in appellant's name was because appellant was the managing partner and, unlike appellee, lived in Houston.").

[25] *See Bradley v. Bradley*, 540 S.W.2d 504 (Tex. Civ. App.—Fort Worth 1976, no writ); *McDonald v. Sanders*, 207 S.W.2d 155 (Tex. Civ. App.—Texarkana 1947, writ ref'd n.r.e.).

[26] *See Bradley*, 540 S.W.2d at 511 ("The Texas Trust Act (Art. 7425b, V.A.T.S.) is not involved here because it has not been pleaded affirmatively as a defense by any party ...."); *McDonald*, 207 S.W.2d at 157 (making no mention of Trust Act).

The per curiam opinion quotes *Gardner* for a general rule that "an agreement between two or more persons for the joint acquisition of land is not a contract for the sale of land." But that quotation is lifted out of its context — the very next sentence bases that rule on the omission of land trusts from the Texas statute of frauds.[27] As land trust were added to the Texas statute of frauds by the Legislature in 1943, this is no longer the general rule.

CONCLUSION

The purpose of the statute of frauds "is to remove uncertainty, prevent fraudulent claims, and reduce litigation."[28] Land titles will be unsettled and uncertain as long as they depend upon parol evidence.[29]

There are many reasons why a buyer may choose to be listed in a deed as "trustee." The per curiam opinion opens up every one of those instances to claims of a parol agreement for joint ownership. Anyone in the world could make such a claim; all they would need for success is a credulous jury. This Court should reconsider the per curiam opinion, as

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[27] *Gardner*, 7 S.W. at 782 ("Under the English statute of 29 Chas. II., parol trusts could not be created by express agreement; but this provision has not been incorporated into our laws.").

[28] *Givens v. Dougherty*, 671 S.W.2d 877, 878 (Tex. 1984).

[29] *Republic Nat'l Bank of Dallas v. Stetson*, 390 S.W.2d 257, 262 (Tex. 1965).

it would frustrate the Legislature's efforts to restrict such parol agreements.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing document was served electronically upon all counsel of record in this cause and in cause no. 11-0265 on the 29th day of July, 2011, as follows:

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