1959
Feb. 16
*Jun. 25

HELENE MARGUERITE PATRICIA JACKMAN (*Defendant*) ..... } APPELLANT;

AND

CECIL WILLIAM JACKMAN (*Plaintiff*) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Husband and wife—Real property—House purchased by husband in wife's name—Trust claimed by husband—Whether presumption of advancement rebutted.

The plaintiff-husband brought action against his wife for judicial separation and, *inter alia*, for a declaration that a certain house was held by the wife on behalf of herself, her husband and their child. The house was bought in 1951, the husband making the down payment of $10,000 out of his own funds, and title was taken in the wife's name only. The trial judge concluded that an outright gift had been intended, but this judgment was reversed by the Appellate Division. The wife appealed to this Court.

Held: The appeal should be allowed; the presumption of advancement had not been rebutted.

Per Kerwin C.J.: In the present case, the important feature was that the wife had been earning money regularly and that the possibility of another separation between the spouses was envisaged by both parties; notwithstanding this the title was taken in the name of the wife and the husband thought he might have to report a gift of $10,000 in his income tax return. The trial judge was right in holding that "there was no understanding or arrangement or even any suggestion from the plaintiff that the defendant should hold" the property in trust.

Per Locke, Martland and Judson JJ.: The evidence did not rebut the presumption that an advancement was intended. Where a husband purchases property or makes an investment in the name of his wife, a

*PRESENT: Kerwin C.J. and Locke, Cartwright, Martland and Judson JJ.

gift to her is presumed in the absence of evidence of an intention to the contrary. Other than the plaintiff's denial that he intended a gift, the only other evidence as to his intention at the time was to be gathered from certain subsequent occurrences. While the absence of natural love and affection between the spouses in this case was a circumstance to consider in determining whether or not an advancement was intended, no question of consideration enters into the matter. A voluntary settlement by a husband could not be impeached by the settlor on the ground of a lack of consideration. The description of the transaction as a post nuptial settlement in the draft of a separation agreement and the evidence given by the plaintiff relating to the question of a gift tax supported rather than rebutted the presumption of advancement.

Per Cartwright J.: The evidence as to the surrounding circumstances and what occurred at the time of the conveyance strengthened rather than rebutted the presumption of gift, and further support for the defendant's case was found in the plaintiff's subsequent declarations.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], reversing a judgment of Riley J. Appeal allowed.

W. G. Morrow, Q.C., for the defendant, appellant.

N. D. Maclean, Q.C., for the plaintiff, respondent.

THE CHIEF JUSTICE:—The appellant-wife and the respondent-husband were married on July 3, 1941, and the only issue of the marriage is Terence Lynwood Norgaard Jackman, born July 31, 1944. The respondent brought an action against his wife in Alberta for judicial separation, custody of the child and for a declaration that a certain property known as 5208 Ada Boulevard, Edmonton, was held by the appellant on behalf of herself, the respondent and the child, or for a variation under *The Domestic Relations Act,* R.S.A. 1942, c. 300, of the terms of the transfer of that property to be mentioned later. He also advanced a claim under *The Dower Act,* 1948 (Alta), c. 7.

The trial judge dismissed the action and allowed the wife's counter-claim for judicial separation and custody of the child but disallowed her claim for maintenance of the latter. He found that the appellant was the sole owner of the property and ordered the respondent to deliver up possession thereof to her. He ordered the respondent to pay

[1] (1958), 15 D.L.R. (2d) 106, 25 W.W.R. 131.

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the appellant her costs of the action. In his reasons he directed that the counter-claim be allowed with costs to the extent indicated but the formal judgment merely directs that the wife recover from the husband her costs of the action.

The Appellate Division[1] allowed in part the present respondent's appeal to it; declared that the appellant held the property in trust for herself and the respondent; ordered her to pay the costs of the appeal; gave her liberty to re-apply for an order for maintenance of the child and the husband liberty to apply for directions as to access to the child; in all other respects the judgment at the trial was affirmed. The wife now appeals from that judgment.

It is unnecessary to detail the marital difficulties of the parties as they appear in the reasons for judgment of the trial judge and of the Appellate Division. When the first house occupied by the husband and wife was purchased under an agreement for sale, the husband was a member of the Armed Services and his parents made the down payment. The appellant is a school teacher and her annual income has been about the same as that of the husband. She kept up the monthly payments on this first house and the balance was paid by the husband. Title was taken in the name of the appellant only and ultimately the property was sold. The second house was purchased in 1946 and while at first the title was in the name of the respondent only, later it was put in the joint names of both parties.

The Ada Boulevard property, which is the one in question, was purchased in 1951 and the circumstances are important. The appellant heard that the property was for sale and telephoned her husband to go out to it immediately. This he did and his wife there informed him that she would like to have the title to it in her own name. As expressed in the respondent's factum, it may be that, as the appellant had left the husband on two previous occasions and taken the child with her, the respondent thought that she might be intending to leave again and he imagined that putting the title in her name would not jeopardize his interest. The respondent says that the appellant promised to make a real home for her husband and son

[1] (1958), 15 D.L.R. (2d) 106, 25 W.W.R. 131.

and that there would be no more trouble on her part. The wife's evidence is that she had left the respondent on the earlier occasions for good cause because of his actions. The respondent made the down payment of $10,000 and although he proposed that title should be in their joint names title was taken in the wife's name only. The husband admits that he considered the possibility of having to report in his income tax return a gift of $10,000.

I agree with the trial judge's statement that: "There was clearly no understanding or arrangement, or even any suggestion from the plaintiff that the defendant should hold the Ada Boulevard home, conveyed to her and in her name, as a trustee for herself and the plaintiff, much less as trustee for herself, the plaintiff and the infant Terence". The applicable law was considered by this Court in *Hyman v. Hyman*[1]. There the circumstances in favour of the husband securing an interest in real estate were more favourable to him than in the present case. At p. 539 of the report it is stated:

> Considering the whole case, we are of opinion that the appellant has failed to bring forward, in the words of Moss, J., in *McManus v. McManus*[2], "clear, distinct and precise testimony" of any definite trust in his favour.

Reliance was placed by the Appellate Division upon the decision of the Court of Appeal in England in *Silver v. Silver*[3], and particularly the following statement by Lord Justice Parker at p. 527:

> We are here considering what I may call a family asset, the matrimonial home, something acquired by the spouses for their joint use, with no thought of what is to happen should the marriage break down. In these circumstances it seems to me that, in the present age, common sense dictates that such an asset should be treated as the joint property of both, in the absence of evidence to the contrary. This view is well expressed by Denning, L.J., in *Fribance v. Fribance* (1957) 1 All E.R. 357 at p. 359); and also in *Rimmer v. Rimmer* ((1952) 2 All E.R. 863).

Even in the *Silver* case the Court of Appeal dismissed an appeal from a county court judge who had declined to make the declaration asked by the husband. I have not overlooked that Lord Evershed pointed out that in this day and age the presumption of advancement is more easily capable of rebuttal than in the past but he felt that

[1] [1934] 4 D.L.R. 532. [2] (1876), 24 Gr. 118.
[3] [1958] 1 All E.R. 523.

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the fact that the original sum of £90 had been provided by the wife's parents was an important factor. In the present case the important feature is that the appellant had been earning money regularly and that the possibility of another separation between the spouses was envisaged by both parties; notwithstanding this the title was taken in the name of the wife and, as I have already pointed out, the husband thought he might have to report a gift of $10,000 in his income tax return.

The respondent does not mention in his factum and his counsel did not argue before us that any claim could be advanced under *The Domestic Relations Act*. He did, however, argue that *The Dower Act* applied. We did not require to hear counsel for the appellant in reply on that question. On both points I entirely agree with what was said by the trial judge.

The appeal should be allowed, the judgment of the Appellate Division set aside and that of the trial judge restored. The appellant is entitled to her costs in the Appellate Division and in this Court.

The judgment of Locke, Martland and Judson JJ. was delivered by

LOCKE J.:—In my opinion, the evidence in this matter does not support the view that the purchase of the property on Ada Boulevard in Edmonton in 1951 was in the nature of a joint venture by a husband and wife, each contributing substantially to the purchase price of the property.

The parties were married in 1941 and the wife, the appellant in this appeal, has been employed continuously since that time, except for a period during the year in which the only child of the marriage was born. With this exception, throughout the period from 1941 until 1955 she has contributed substantially to the living expenses of the family. However, her contribution to the purchase of the various house properties during that time appears to have been slight.

The first house, situated on 91st Street, was purchased at a time when the respondent was on military service and absent from Edmonton. The purchase was negotiated by

the appellant and made in her own name. The down payment of $800 was made out of moneys given to her by the parents of the respondent. The total purchase price was $3,750 and it was apparently payable in instalments and the appellant contributed something towards these payments, the amount of which is not disclosed by the evidence. The final payment of $1,900 was made by the respondent and the title was taken in the appellant's name. A second house on the same street was purchased by the respondent in 1946. The first house was sold for $4,500 and this was applied on account of the purchase price of $6,000 for the second house and the balance of $1,500 was paid by the respondent. The respondent took title to the second house in his own name but, according to him, the appellant threatened to leave him and to take the child with her at some time in the year 1948 unless the respondent would transfer the property into their joint names, and this was done and the title to that property remains in that state up to the present time.

The appellant contributed nothing to the cash payment of $10,000 made on account of the purchase of the third property in May of 1951. It would thus appear that, in regard to all three properties up to and including the date of the last purchase, the contributions of the wife were limited to such portion of the $3,750 paid as the price of the first house as she contributed, surplus to the $2,700 paid by the respondent or by his parents on his behalf.

In these circumstances, it does not appear to me that a case is made out for describing the third property as a family asset, in the sense that that expression was used by Parker L. J. in *Silver v. Silver*[1], which is referred to in the reasons for judgment of Mr. Justice Johnson.

Riley J., by whom the action was tried, concluded upon the evidence that an outright gift was intended when the respondent directed that the purchase of the Ada Boulevard property should be made in his wife's name and paid the

[1] [1958] 1 All E.R. 523 at 527.

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required cash payment out of his own funds. The unanimous judgment of the Appellate Division[1] has reversed this finding, declaring that the appellant holds the property as trustee for her husband and herself.

Where a husband purchases property or makes an investment in the name of his wife, a gift to her is presumed in the absence of evidence of an intention to the contrary. The basis for this, as it applies to a father and his son, is stated in the early cases: *Dyer v. Dyer*[2] and *Finch v. Finch*[3], by Lord Eldon at p. 50 where, referring to the case of *Dyer v. Dyer,* he said that where A purchases in the name of B, A paying the consideration, B is a trustee notwithstanding the Statute of Frauds, but that rule does not obtain when the purchase is in the name of a son and such a purchase is an advancement *prima facie.*

In *Fowkes v. Pascoe*[4], Sir W. M. James L.J. at p. 350 spoke of the presumption as being that the advancement is an anticipation of a testamentary provision. The authorities are collected in Lewin on Trusts, 15th ed., p. 148 et seq. and the rule as stated by Chief Baron Eyre in *Dyer v. Dyer* shown to have been applied to such transactions between husband and wife.

The question to be determined is as to what was the intention of the respondent when he arranged the purchase of the property on Ada Boulevard in his wife's name and paid the amount of $10,000 from his own funds. The respondent's account of the transaction is that while he was negotiating the purchase his wife said that she would like to have it made in her name, that he at first demurred, and then:

> She promised to give me the (sic) real home for the boy and I and I still demurred and she started for the door, picked up her purse off the table, and I thought it possibly to put it in her name would not jeopardize my interest and we would have a home and it was something I wanted very much, so at the moment I agreed it would go in her name and she said we would have a family home.

The appellant gave evidence but said nothing as to what had taken place at the time of purchase and gave no explanation of why it was made in her name.

[1] (1958), 15 D.L.R. (2d) 106, 25 W.W.R. 131.
[2] (1788), 2 Cox 92, 30 E.R. 42.
[3] (1808), 15 Ves. 43, 33 E.R. 671.
[4] (1875), L.R. 10 Ch. 343.

Other than the respondent's denial that he intended to give this property to his wife, the only other evidence as to his intentions at the time is to be gathered from certain subsequent occurrences. The respondent when examined for discovery had been asked whether he had reported the transaction as a gift when making his next income tax return. He had said that he found that it was unnecessary to report the gift "until the mortgage is paid off because it is not a gift until the mortgage company transfers the title to the ownership (sic) of the purchaser." He had also said on discovery:

> And another thing, there was the income tax problem: I was making a gift of $10,000. I proposed that at best we should put it in our joint names.

In August 1955 the appellant left home without the respondent's consent, removing practically all of the furniture, and the parties have since lived apart, the child remaining with the mother. In the following year the parties met and apparently agreed upon the terms of a separation. The respondent was to make a payment of $9,000 and the wife to transfer the Ada Boulevard property to him. By arrangement the parties went to Mr. W. G. Chipman, a solicitor in Edmonton, and gave him instructions to draw an agreement. Mr. Chipman was the respondent's solicitor and it was understood that the appellant would submit the agreement when drawn to her own solicitor for approval. This proposed agreement, which was not signed since the appellant's solicitor did not approve of it, was put in evidence. The preamble recited that the wife had left what was referred to as the marital home, 5208 Ada Boulevard, Edmonton, on August 30, 1955, and that the parties had agreed to live separate from each other in the future. A second recital read:

> And whereas the said marital home, purchased and paid for by the husband, was placed in the name of the wife, as registered owner, at her request as a post nuptial settlement;

Mr. Chipman gave evidence and said that the draft agreement had been prepared as a result of the instructions given to him by the parties at an interview at which both were present and that he had gone through its terms with each of them and they both agreed with them.

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The only other evidence from which any inference can be drawn in determining the intention of the respondent and the understanding of the appellant as to what was intended is to be found in the fact that from May 1951 until August 1955 the monthly payments required to be made on the mortgage on the Ada Boulevard property were made by the appellant out of the rentals which she received from the 91st Street property, apparently with the consent of the respondent, and the further fact that the respondent, according to his evidence, made improvements to the property during this period to the extent of about $2,500.

In determining the question of fact as to the intention of the respondent in arranging the purchase in his wife's name, the learned trial judge, in concluding that the presumption of advancement had not been rebutted, attached importance to the fact that the transaction was referred to as a post nuptial settlement in the draft agreement and to the statements made by the respondent in relation to the question of a gift tax to which I have referred above. Johnson J. A., who delivered the unanimous judgment of the Appellate Division, attached importance to the undoubted fact that there was little in the nature of natural love and affection between the parties whose marriage appears to have been a most unhappy one almost from the outset, and considered that this indicated a lack of consideration for a transfer of the property into the wife's name.

With great respect, while the absence of natural love and affection between the husband and the wife in the present matter is a circumstance to consider in determining whether or not an advancement was intended, no question of a consideration for the transfer enters into the matter. A voluntary settlement by a husband cannot be impeached by the settlor on the ground of a lack of consideration, and the transaction which took place in this matter was described, with the respondent's approval, as a post nuptial settlement in the draft agreement.

The fact that the reasons for judgment delivered by Johnson J. A. do not deal with the fact that, with the respondent's approval, the transaction was referred to in

the draft agreement as a post nuptial settlement does not, of course, indicate that this circumstance was not considered by the learned judges of the Appellate Division but, with great respect, it appears to me that sufficient weight was not given to this material evidence. In the reasons it is said that it is not disputed that a gift of a part interest in the property was intended but that anything less than a conveyance of the entire interest was intended is not, in my opinion, supported by the evidence.

While the case for the appellant does not appear to me to be as clear as that of the wife in the case of *Hyman v. Hyman*[1], which was decided in this Court, since there the husband had sworn to an affidavit on the conveyance, stating that the only consideration for the transfer was natural love and affection and the same was a gift to the grantee, the description of the transaction in the draft agreement and the evidence given by the respondent relating to the question of gift tax does support rather than rebut the presumption of advancement. In my view, no support is to be found for the respondent's position from the fact that he had transferred the 91st Street property into the joint names of his wife and himself when she threatened to leave him in 1948. I do not think this justifies an inference that when the Ada Boulevard property was purchased he intended that she should hold the property in trust for the two of them or for them and the infant child, rather does it indicate the contrary.

In my opinion, the evidence does not rebut the presumption than an advancement was intended and the finding made at the trial should not have been disturbed. I would accordingly allow this appeal with costs in this Court and in the Appellate Division and restore the judgment at the trial.

CARTWRIGHT J.:—The relevant facts and the views taken by the Courts below are stated in the reasons of the Chief Justice and those of my brother Locke.

[1] [1934] 4 D.L.R. 532.

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There appears to be no difference of opinion as to the applicable rule. It is concisely and accurately stated in Halsbury, 3rd ed., vol. 19, p. 832:

> Where a husband purchases property or makes an investment in the name of his wife, a gift to her is presumed in the absence of evidence of an intention to the contrary.

In my opinion, the effect of the evidence as to the surrounding circumstances and what occurred at the time when the respondent directed the conveyance to be made to the appellant is to strengthen rather than rebut the presumption of gift, and the appellant's case finds further support in the subsequent declarations of the respondent. I agree with the conclusion of the learned trial judge.

I would allow the appeal and restore the judgment at the trial with costs throughout.

Appeal allowed with costs.

Solicitors for the defendant, appellant: Miller, Miller & Witten, Edmonton.

Solicitors for the plaintiff, respondent: Maclean & Dunne, Edmonton.