

CANADA / JUDGMENT

Bingeman v. McLaughlin

[1978] 1 SCR 548

COURT

Supreme Court of Canada

DECIDED

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Report

[1978] 1 SCR 548

Judges

Laskin, Bora; Martland, Ronald; Judson, Wilfred; Spence, Wishart Flett; Beetz, Jean

On appeal from

Ontario

Subjects

Family law

Decision Content

Supreme Court of Canada

Bingeman v. McLaughlin, [1978] 1 S.C.R. 548

Date: 1977-05-31

Gordon A. Bingeman (Plaintiff) Appellant;

and

Evelyn Mae McLaughlin (Bingeman) (Defendant) Respondent.

1977: March 22, 23; 1977: May 31.

Present: Laskin C.J. and Martland, Judson, Spence and Beetz JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Husband and wife—Husband conveying to wife his undivided one-half interest in property jointly owned with wife—Presumption of advancement—Husband seeking to rebut presumption—Effect of statute enacted after commencement of proceedings—The Family Law Reform Act, 1975 (Ont.), c. 41, s. 1 (3).

Appellant and respondent were married in 1950. In 1954 appellant made an agreement with his father for the purchase of the sixty-four acres of land on which the couple had been living with appellant's parents. Both appellant and respondent contributed to the down payment and to the payment of the balance of the purchase price. In 1961 when the balance of the purchase price had been paid the property was conveyed to appellant and respondent as joint tenants and they continued to occupy the premises. In 1963 or 1964 appellant was involved with another woman and contemplated leaving home. Subsequently in 1967 as a result of a threat of suit by the neighbour with whose wife appellant had been involved and concern expressed by respondent that her interest in the joint tenancy might be in danger, appellant, on the advice of his solicitor, conveyed to respondent his undivided one-half interest in the lands. At the same time appellant conveyed a recreation property to the respondent and other lands to a trustee in trust for his son. In 1969 the appellant left the premises. Appellant made no contribution thereafter for respondent's maintenance and none was demanded. The conveyances were subsequently registered.

On application by appellant that he was entitled to restoration of his one-half interest in the property the trial judge held that the presumption in the case of a conveyance from a husband to a wife, that the husband conveyed the property for the advancement of the wife could not be rebutted by the husband saying that he only did it to defeat his creditors. The Court of Appeal agreed Held: The appeal should be dismissed.

Evidence as to the conduct of appellant from 1963 or 1964 to the date of the conveyance and thereafter rather than tending to rebut the presumption tended to confirm it. After the conveyance appellant continued to live with the respondent from December 1967 to February 1969. When appellant did leave he did not demand reconveyance of his interest or any realization of the marital property and generally his conduct could only be taken as confirming his conveyance of his interest in the lands in question and of the recreation property leaving the parties to go their own ways thereafter.

Appellant also sought to rely on s. 1(3)(d) of The Family Law Reform Act, 1975 (Ont.), c. 41 which abolished the presumption of advancement in questions of the ownership of property as between husband and wife and replaced it with a presumption of a resulting trust in the same manner as if they were not married. That statute came into effect after the date of the trial judgment and before the date of the argument in the Court of Appeal. However the presumption of

advancement was not a mere rule as to the admissibility of evidence as appellant suggested. It was a rule of substantive law and since the statute did not provide in express terms or by necessary implication that it should apply to circumstances arising before its effective date the statute had to be ignored in dealing with such circumstances.

Goodfriend v. Goodfriend, [1972] S.C.R. 640; Tinker v. Tinker, [1970] 1 All E.R. 540; Wilson v. Dagnall, [1972] 1 Q.B. 509; Phillips v. Eyre (1870), L.R. 6 Q.B. 1 referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1] dismissing an appeal from a judgment of Osler J.[2] at trial dismissing an application for a declaration that the applicant husband was entitled to a one-half interest in certain lands. Appeal dismissed.

John Sopinka, Q.C., and J.P. Giffen, Q.C., for the appellant.

G.H. Lohead, Q.C., for the respondent.

The judgment of the Court was delivered by

SPENCE J.—This is an appeal from the judgment of the Court of Appeal for Ontario pronounced on February 3, 1976. By that judgment, the said Court of Appeal for Ontario dismissed an appeal from the judgment of Osler J. pronounced on November 21, 1973 dismissing an application by the present appellant for a declaration that he was entitled to a one-half interest in certain lands comprising 64 acres and described as the “Bridge Street lands”. There had also been an application for the partition of the said lands under the provisions of The Partition Act but that application was withdrawn at the opening of the hearing before Osler J. who, therefore, considered only the application for a declaration which application, as I have said, Osler J. dismissed.

The appellant and respondent were man and wife having been married in 1950 and resided with the appellant’s parents on these lands. In September 1954, the appellant made an agreement with his father for the purchase of the said lands and both the appellant and the respondent contributed to both the down payment and the payment of the subsequent instalments on the purchase price.

In September 1961, when the balance of the purchase price had been paid, the father of the appellant conveyed the property to the appellant and respondent as joint tenants. The appellant and respondent as man and wife continued to occupy the premises.

In 1963 or 1964, the appellant had become involved with another woman as a result of which he told the respondent that he had a feeling that he should leave home. At that time, the appellant stated to the respondent that the only thing he could do for her and the children was to give them his half of the farm. Toward the end of August 1967, a neighbour, Hilker, informed the appellant that he Hilker was aware of the appellant’s adulterous conduct with Mrs. Hilker and made very strenuous threats. Upon the respondent’s return from Expo, the appellant informed her of the situation, admitted the improper association and again wondered if he should leave home. The appellant had during the summer of 1967 been considering leaving his employment as a

constable with the Ontario Provincial Police and purchasing a mercantile business and had discussed with his solicitor, the late Mr. Schofield of Waterloo, the protection of his assets from creditors to whom he might become indebted as a result of carrying on any business which he should acquire. As it turned out, the appellant never did acquire any business or incur any liabilities to business creditors.

In November 1967, the respondent, during the appellant's absence from the home, also received a telephone call from Mr. Hilker who informed her of the appellant's misconduct and the respondent told her husband of this telephone conversation and expressed the opinion that Hilker might sue her husband and that he should see a solicitor and obtain his advice. The respondent frankly admitted that she was worried that their title to the property might be in danger as a result of a suit by Hilker. She pointed out that she had an interest by virtue of the joint tenancy and that, in fact, she had contributed the larger portion of the purchase price for the property. The appellant did go to his solicitor, Mr. Schofield, and discussed the matter with him. Acting on Mr. Schofield's advice, a conveyance was drafted dated December 1, 1967. By that conveyance the appellant purported to grant unto the respondent his undivided one-half interest in the said lands. The appellant executed the conveyance and also executed the affidavit of legal age and marital status. The solicitor, Mr. Schofield, witnessed the execution by the appellant and his affidavit of execution was with the appellant's affidavit of legal age and marital status sworn on the 29th of December 1967. The conveyance was left with the solicitor, Mr. Schofield.

At the same time, the appellant executed a conveyance of a recreation property at Chesley Lake in the County of Bruce in favour of the respondent and another conveyance of other lands to a trustee in trust for his son.

Upon the appellant returning from Mr. Schofield's office to the farm home of the parties, he informed the respondent that he had executed the aforesaid conveyances and said to her:

A. He told me he did not own a thing in the world, and it was up to me to carry the ball, that he wasn't going to contribute anything more to the farm.

Q. Did he say why?

A. Because he did not own it. The parties continued to reside together as man and wife until February 1969 at which date the appellant left the premises. He then took with him all his personal effects and even substantially all the farm machinery. He did leave on the farm, it being in the dead of winter, certain livestock but shortly thereafter, and it would appear to be April of 1969, at the demand of the respondent, made through the same solicitor, Mr. Schofield, he removed the livestock from the farm. Although the parties were separated the appellant never made any contribution for the respondent's alimony or maintenance nor did she make any demand for such assistance.

The respondent attended Mr. Schofield, the same solicitor who had drawn the conveyances of these and the other lands and as a result of her instructions to the said solicitor, the conveyance from the appellant to the respondent of the appellant's one-half interest in the said lands which had been executed on December 29, 1967 was registered on March 5, 1969. Much later, on September 29, 1969, the late Mr. Schofield wrote to the appellant enclosing various documents and ended his letter with the statement:

The deeds of the Waterloo Township farm property and the cottage lots at Chesley Lake were delivered in accordance with your instructions to your wife and have been registered.

Certain evidence was given at the trial as to conversation between Mr. Schofield and the respondent during her attendance at Mr. Schofield's office to which I have referred. It was the opinion of Brooke J.A. giving reasons for the Court of Appeal that that evidence was inadmissible but that the learned trial judge had given no weight to it. With respect, I am in agreement with that view and I refrain from any reference to the said conversation.

I conclude my recital of the facts by noting that Hilker has not taken any proceedings against the appellant, although, as the courts below point out, the limitation period had not expired, at any rate, up to the date of the argument of the appeal herein. The record does not include the application made under the provisions of The Married Women's Property Act, R.S.O. 1960, c. 229, so I am unable to give a date when the appellant commenced proceedings but the statement of claim was issued in accordance with the order of the learned County Court Judge directing the trial of the issue and that order was dated August 31, 1971. In that statement of claim, the appellant claimed:

- (a) For a Judgment rescinding the conveyance to the Defendant of the property known for Municipal purposes as 568 Bridge Street, Waterloo, registered as Instrument Number 392741 at the Registry Office for the Registry Division of the County of Waterloo on the 5th day of March 1969, returning said property to its former joint ownership by the Plaintiff and the Defendant as joint tenants and not as tenants in common.

It was this claim which Osler J. described as an application for a declaration. The appellant in seeking a declaration that he has a half-interest in the lands at issue, is relying upon the well-established principle that a person who causes a property to be registered in the name of another without that other having given consideration therefor has established a resulting or constructive trust in his own favour. The appellant, however, is faced with the also well-established principle, subject to the provisions of The Family Law Reform Act, 1975 (Ont.), c. 41, that when a conveyance is made from a husband to his wife or even from a third party to the wife, the consideration therefor having been given by the husband, there is a rebuttable presumption of intention to advance the said wife. In the present case, the lands were held by the appellant husband and the respondent wife as joint tenants. The transfer of the appellant's undivided half-interest was made without consideration other than natural love and affection and the affidavit of land transfer tax executed by the appellant shows the total consideration to be \$1 and that the transfer was for natural love and affection, the relationship between the grantor and

the grantee being husband and wife. Therefore, the presumption of advancement to which I have just referred applies exactly to the situation unless the appellant is able to rebut that presumption. It was the opinion of Osler J. on the trial of the issue that the appellant had not adduced a cause for rebuttal of that presumption and that view was confirmed in the Court of Appeal for Ontario.

With respect, I am of the opinion that the conclusion of the courts below was correct. It is most important to remember that even in the year 1963 or 1964 the appellant, when considering whether or not he should leave the family home because of his misconduct with another woman, expressed the view that all he could do for his wife and family was to give up the half-interest in the marital property and that again, in the summer of 1967, prior to any problem connected with possible litigation by Hilker, the appellant went so far as to consult his solicitor as to the protection of the marital property against future creditors. Later, in November 1967, when in his view some proceedings by Hilker against him were imminent, he executed the conveyance of his undivided half-interest to his wife.

In my view, this conduct of the appellant continued from 1963 or 1964 up to the date of that conveyance, and thereafter exhibited a steady intent to advance his wife, and rather than being evidence tending to rebut the presumption is evidence tending to confirm it. The events subsequent to the execution of the conveyance strongly support such a conclusion. After the conveyance, the appellant continued to live with the respondent from December 1967 to February 1969. As I have said Hilker took no action during that time and the appellant made no venture into the business world which would have resulted in his incurring business liabilities. That was the situation in February 1969 when the appellant left the family residence. The appellant did not then demand any reconveyance of his half-interest or any realization of the marital property. He simply moved out taking all his personal belongings and the farm machinery, and a short time after even the farm livestock. No offer of maintenance was made by the appellant nor demanded by the respondent. Surely this course of conduct on the part of the appellant could only be interpreted as a confirmation of the conveyance of his half-interest in the lands in question as well as those in the recreation property with the intention of advancing his wife and leaving both parties to go their own ways thereafter.

The appellant submits that the decision of this Court in *Goodfriend v. Goodfriend*[3], supports his position. There, the majority of this Court held that where a wife had persuaded her husband that he should make a gratuitous transfer to her because she, rather than he, thought he might be sued successfully, when, in fact, no action lay; the wife could not rely on the presumption of advancement and retain the land. I am of the view the circumstances are very different. Here, the possibility of action by Hilker was not merely imaginary. Hilker, on the facts, had a good cause of action had he chosen to assert it.

In the *Goodfriend* case, in addition, there was no other intent in the transfer but to protect the husband's property from a danger of action by the third party which the wife imagined. Here, as I have outlined, there was a steady intent from 1963 or 1964 on to advance the wife. For what it is worth, the affidavit of land transfer tax in *Goodfriend* was not completed as, in the present case,

by a statement that the transfer was for natural love and affection but rather by striking out those words in the affidavit and inserting the words “husband transferring to wife”. Again, in the Goodfriend case, the one asset was transferred by the conveyance from husband to wife and other very valuable assets were not transferred. In the present case, the appellant transferred his half-interest in the lands in question and in the recreation property to his wife and other lands to a third party to hold for his son with the very evident intention of divesting himself. It is also noteworthy that the appellant has never demanded any like declaration as to the recreation property.

With respect, I agree with the view expressed by both Osler J. and the Court of Appeal for Ontario that Goodfriend and Goodfriend does not apply in the circumstances of the present case. It would seem that Lord Denning’s dilemma as enunciated in *Tinker v. Tinker*[4] is applicable. There he said at p. 542:

So he is on the horns of a dilemma. He cannot say that the house is his own and, at one and the same time, say that it is his wife’s. As against his wife, he wants to say that it belongs to him. As against his creditors, that it belongs to her. That simply will not do. Either it was conveyed to her for her own use absolutely; or it was conveyed to her as trustee for her husband. It must be one or other. The presumption is that it was conveyed to her for her own use; and he does not rebut the presumption by saying that he only did it to defeat his creditors.

I wish to stress that, in my view, this case can be decided without reference to either Goodfriend or *Tinker* upon the evidence which I have outlined and which convinces me that there was present an intention to advance the wife apart from any desire to protect the property from possible creditors, either of a commercial nature or as a result of litigation by Hilker.

The appellant also relies on the provisions of The Family Law Reform Act, 1975 (Ont.), c. 41. By s. 1(3)(d) it is provided:

- (d) the rule of law applying a presumption of advancement in questions of the ownership of property as between husband and wife is abolished and in place thereof the rule of law applying a presumption of a resulting trust shall be applied in the same manner as if they were not married, except that...

That statute received its third reading on June 27, 1975, and was given Royal Assent on July 3, 1975. Section 9 thereof provided that it should come into force on a day to be named by Proclamation of the Lieutenant Governor and it was proclaimed in force on July 10, 1975.

As I have said, the appellant’s application must have been served prior to August 31, 1971. The trial of the issue took place on the 5th and 7th of November 1973. The judgment of the learned trial judge was pronounced on the 21st of November 1973. So that between the date of that judgment and the date of the argument in the Court of Appeal for Ontario the said statute came into force. The appellant submits that that statute abolishing the presumption of advancement is a statute dealing with admissibility of evidence and therefore procedure and that the well-established principle that statutes should not have a retrospective effect unless clearly stated

therein does not apply to statutes dealing with procedure.

Wilson v. Dagnall^[5], was an action where the sole issue was the quantum of damages which would be allowed to a widow under the provisions of the Fatal Accidents Act. The widow issued a writ in March 1970 and on August 1, 1971 a section of the Law Reform (Miscellaneous Provisions) Act, 1971, (U.K.) received Royal Assent and came into force. It provided that in assessing damages payable to a widow the widow's prospects of remarriage should not be taken into account. At the trial of the action on July 27, 1971, the learned trial judge purported to apply the new section. It was held on appeal that he had no right to do so and that the Court of Appeal had to consider the law in existence at the time of the trial, so that it too could not apply the new section.

I am of the opinion that Wilson v. Dagnall is applicable in the present circumstances. The presumption of advancement is not a mere rule as to the admissibility of evidence but is a rule of substantive law and, unless the statute provides in express terms or by necessary implication that it should apply to circumstances arising before its effective date, the statute should be ignored in dealing with such circumstances, especially in the present case where the statute actually came into force after the trial of the action. For the proposition as to the presumption against retrospective effect, one need not do more than cite Phillips v. Eyre^[6], and Willes J.'s famous pronouncement therein which has been accepted law ever since. For these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Fasken & Calvin, Toronto.

Solicitors for the respondent: Lohead, Sills, Kitchener.

[1] (1976), 12 O.R. (2d) 65.

[2] (1973), 1 O.R. (2d) 485.

[3] [1972] S.C.R. 640.

[4] [1970] 1 All E.R. 540.

[5] [1972] 1 Q.B. 509.

[6] (1870), L.R. 6 Q.B. 1.

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