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Real Property Held by Tenants by the Entirety as the Subject of an Advancement - Barron v. Janney

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Real Property Held By Tenants By The Entirety As The Subject Of An Advancement

Barron v. Janney[1]

An aged couple owned a tract of land adjacent to the family farm as tenants by the entireties. They improved the tract by remodeling an old school house thereon into which their daughter, the defendant, moved in 1953. In 1957 the parents jointly conveyed by deed all their interest

[1] 225 Md. 228, 170 A. 2d 176 (1961).

to the defendant.[2] After the parents died intestate a year apart, the brother of the defendant filed a bill in equity seeking to require his sister to elect whether she would treat the conveyance as an advancement or partition the tract between herself and the complainant. There was conflicting testimony in regard to the actual intent of the father with respect to the conveyance, and no testimony was introduced as to the intent of the mother. The chancellor found the conveyance to be an advancement. In reversing, the Maryland Court of Appeals assumed, without deciding, that the doctrine of advancements was still applicable to real property, but held that the conveyance to the defendant was not an advancement.

The Court found one of the essential elements of an advancement to be "that the gift must have been part of the estate of a donor, which upon his death would descend to his heirs but for the fact that, by his act of making the gift, it had been separated from or taken out of his estate."[3] Since neither parent could have died intestate seized and possessed of property owned by the entireties, because, upon the death of either, the whole would remain in the survivor with the heirs of the first deceased spouse taking no interest, the Court declared that, in order for the property to have been an advancement, it would have had to have been held by moieties and not by entireties. Since the basic requirement of intestacy with respect to the property in question was lacking, there could have been no advancement.

The doctrine of advancements[4] is a creature of statute[5] and results from the intent of the legislature to provide for equality among the heirs of the decedent.[6] Generally, an advancement is an irrevocable gift in presenti of money or property, from an intestate to a descendant, to enable the donee to anticipate his inheritance to the extent of the

[2] In 1955 the father informed the defendant in a written note, signed only by himself, that the remodeled school house was hers. This note alone could not have formed the basis of an advancement since the father had no estate he could have given to the defendant due to the survivorship feature of property held by the entireties.

[3] *Supra*, n. 1, 236.

[4] For a general discussion of advancements see Elbert, *Advancements: I, II, III*, 51 Mich. L. Rev. 665 (1953); 52 Mich. L. Rev. 231 (1953); 52 Mich. L. Rev. 535 (1954).

[5] 4 VERNIER, AMERICAN FAMILY LAWS (1936) 114; but see 3 AMERICAN LAW OF REAL PROPERTY (1952) 585 as a possible qualification.

[6] Dilley v. Love, 61 Md. 603 (1883).

> "[C]ourts, both in this country and in England, have uniformly given a liberal construction to such enactments, in order to enforce the cardinal doctrine which they announce, that in all such cases equality is equity." (605)

gift.[7] Although there is a great diversity in the treatment of detail in the various jurisdictions,[8] in every state but New Mexico[9] there are statutes recognizing the doctrine. A majority of jurisdictions have enacted statutes concerning advancements which are expressly applicable to both real and personal property.[10] The statutes in the remaining jurisdictions speak in more general terms. The Indiana,[11] Iowa,[12] and Kansas[13] statutes employ the term "property." The Georgia Code[14] contains the words "either in money or property," while the Florida advancement statute[15] provides, "[w]hen any person shall have received any advancement from an intestate . . . ." However, even though these general terms are employed, such statutes have been interpreted so as to encompass both reality and personalty[16] or the courts have charged both realty and personalty without any discussion of the problem.[17]

[7] See the general discussion in the Michigan Law Review, *supra*, n. 4, for further refinements of the definition of advancements which is beyond the scope of this note.

[8] ATKINSON, WILLS (2d ed. 1953) 716.

[9] But see Harper v. Harris, 294 F. 44 (8th Cir. 1923) apparently assuming that the doctrine exists in New Mexico.

[10] 5 CODE OF ALA. (1958) tit. 16, § 14; 6 ARIZ. REV. STAT. ANNO. (1956) § 14-211; 5 ARK. STAT. ANNO. (1947) § 61-116; 54 WEST'S ANNO. CALIF. PROBATE CODE (1956) § 1051; 6 COLO. REV. STAT. (1953) § 152-2-5; 21 CONN. GEN. STAT. ANNO. (1960) § 45-274; 8 DEL. CODE ANNO. (1953) tit. 12, § 515; D.C. CODE (1951) § 18-108; 3 IDAHO CODE (1948) § 14-107; SMITH-HURD ILL. ANNO. STAT. (1961) § 3-15; BALDWIN'S KY. REV. STAT. ANNO. (1955) § 391.140; 5 LA. CIVIL CODE (1952) Art. 1227, 1254, 1255, 1283; 4 ME. REV. STAT. (1954) ch. 170, § 4; 6 ANNO. LAWS OF MASS. (1955) ch. 196, § 3; 23 MICH. STAT. ANNO. (1943) § 27.3178 (157); 31 MINN. STAT. ANNO. (1947) §§ 525.53, 525.531; 1A MISS. CODE ANNO. (1942) § 475; 26 VERNON'S ANNO. MO. STAT. (1956) § 474.090; 6 REV. CODE OF MONT. ANNO. (1947) § 91-412; 2A REV. STAT. OF NEB. (1956) § 30-112; 2 NEV. COMP. LAWS (Supp. 1942) § 9882.301; 5 N. H. REV. STAT. ANNO. (1955) §§ 561.13, 561.15, 561.16; N. J. STAT. ANNO. (1953) § 3A:4-8; 13 MCKINNEY'S CONSOL. DECEDENT ESTATE LAW OF N. Y. ANNO. (1949) § 85; 2A GEN. STAT. OF N. C. (1950) § 29-1, Rule 2; 6 N. D. CENTURY CODE (1960) § 30-21-12; PAGE'S OHIO REV. CODE ANNO. (1954) § 2105.05; 2 OKLA. STAT. (1951) tit. 84, § 223; 2 ORE. COMP. LAWS ANNO. (1940) § 16-301; 20 PURDON'S PA. STAT. ANNO. (1950) tit. 20, § 1.9; 6 GEN. LAWS OF R.I. (1956) § 33-1-11; 2 CODE OF LAWS OF S.C. (1952) § 19-56; 3 S. D. CODE (1939) § 56.0114; 6 TENN. CODE ANNO. (1955) § 31.702; 17A VERNON'S ANNO. TEX. STAT. PROBATE CODE (1956) § 44; 8 UTAH CODE ANNO. (1953) § 74-4-18; 5 VT. STAT. ANNO. (1958) tit. 14, § 1723; 9 CODE OF VA. (1950) § 64-17; 3 REMINGTON'S REV. STAT. OF WASH. ANNO. (1932) § 1348; 1 W. VA. CODE ANNO. (1955) § 4094; 37 WEST'S WIS. STAT. ANNO. (1958) § 318.24; 3 WYO. STAT. (1959) § 2-41.

[11] 3 BURNS' IND. STAT. ANNO. (1953) § 6-210.

[12] 2 CODE OF IOWA (1958) § 636.44.

[13] GEN. STAT. OF KAN. ANNO. (1949) § 59-510.

[14] 31 CODE OF GA. ANNO. (1959) § 113-1013.

[15] 21 FLA. STAT. ANNO. (Cum. Supp. 1960) § 734.07.

[16] West v. Beck, 95 Iowa 520, 64 N.W. 599 (1895).

[17] Bowen v. Holland, 184 Ga. 718, 193 S.E. 233 (1937); Pylant v. Burns, 153 Ga. 529, 112 S.E. 455 (1922); Klein v. Blackshere, 113 Kan. 539, 215 P. 315 (1923); Johnson v. Eaton, 51 Kan. 708, 33 P. 597 (1893).

In Maryland the descent (or inheritance) statutes[18] and distribution statutes[19] are codified under different articles. This separation has lead to some doubt as to whether the doctrine of advancements is still applicable to realty[20] since Article 46, Section 31 of the 1911 Maryland Code,[21] which dealt with advancements of real property, along with other sections of the inheritance statute, was repealed in 1916.[22] The reason for abolishing these sections was to more closely assimilate the rules regulating the descent of realty with those regulating the distribution of personalty.[23] On this basis, the Maryland Court of Appeals in a recent case, *Kreamer v. Hitchcock*,[24] stated that "Sections 1 and 2 of Article 46 [which accomplished the assimilation of the descent and distribution rules] in practical effect incorporate by reference the provisions of Article 93 relating to the distribution of personal property of intestates". It would, therefore, logically seem to follow that since the only advancement statute is now contained within Article 93 relating to the distribution of personal property of intestates, it should be applicable to real, as well as personal property, as the court *assumed* in the principal case.

Since real property may be the subject of an advancement, does the fact that *tenants by the entireties* conveyed the realty to their heir prior to their death prevent the conveyance from being an advancement? It has been said that one of the necessary prerequisites of a valid advancement is that the donor must have irrevocably parted with his title in the subject matter of the advancement, said title passing to and vesting in the donee.[25] Since an irre-

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[18] 4 MD. CODE (1957) Art. 46.

[19] 8 MD. CODE (1957) Art. 93.

[20] 8 M.L.E. (1960) 334, Descent and Distribution, § 53; 2 SYKES, MARYLAND PROBATE LAW AND PRACTICE (1956) 58.

[21] 1 MD. CODE (1911) Art. 46, § 31:
"Any child or children of the intestate, or their issue, having received from the intestate any real estate by way of advancement may elect to come into partition with the other parceners on bringing such advancement . . . into hotchpot with the estate descended. . . ."

[22] MD. LAWS 1916, ch. 325.

[23] *Ibid.*
"An act to repeal Sections 1 to 23 (inclusive), 25, 26, 27, 28 and 31 of Article 46 of the Code . . . and to enact in lieu thereof four new sections . . . ; thereby assimilating the law relating to the real property of decedents more nearly to the law relating to personal property."

[24] 207 Md. 454, 462, 115 A. 2d 255 (1955), cited in principal case, p. 234.

[25] Colley v. Britton, 210 Md. 237, 123 A. 2d 296 (1956); Harley v. Harley, 57 Md. 340 (1882); Fennell v. Henry, 70 Ala. 484, 45 Am. Rep. 88 (1881); McCellan v. McCauley, 158 Miss. 456, 130 So. 145 (1930); Greene v. Greene, 145 Miss. 87, 110 So. 218, 49 A.L.R. 565 (1926); Callender v. McCreary, 4 How. 356 (Miss. 1840), cited in principal case, p. 236;

vocable transfer of the donor's title is necessary, courts have held that the donor must have possessed an alienable estate in the property at the time of the transfer, and, if an inalienable estate were purportedly transferred to the donee, no advancement could have been made.[26] Although at common law the husband, who owned property with his spouse by the entireties, alone had the power to alienate same[27] and thereby divest his wife of her right of possession during his lifetime, by the weight of modern authority, with the inception of Married Women's Acts,[28] neither spouse alone has any specific interest in the property to convey or encumber so held as long as the tenancy exists,[29] notwithstanding some decisions to the contrary.[30]

Further, and perhaps of greater significance, in order for a valid advancement to occur, the property which was transferred to the donee must have been a part of the donor's estate at the time of the advancement, and, upon the donor's death, would have descended to his heirs had the donor died intestate at that time.[31] In other words, the property transferred must have been inheritable upon the death of the intestate. However, one of the incidents of a tenancy by the entireties, perhaps the most important,[32] is the right of survivorship[33] which cannot be defeated by any act of the co-tenant.[34] Since property so held does not pass by succession upon the death of a tenant by the entireties but rather *remains* in the living co-tenant by the incident of survival,[35] the property is non-inheritable and,

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Rickenbacker v. Zimmerman, 10 S.C. 110, 30 Am. Rep. 37 (1878), cited in principal case, p. 236, Darne's Ex'r v. Lloyd, 82 Va. 859, 5 S.E. 87 (1887).

[26] McClellan v. McCauley, *supra*, n. 25; Greene v. Greene, *supra*, n. 25; Rains v. Hays, 6 Lea. 303, 40 Am. Rep. 39 (Tenn. 1880).

[27] Cases collected in 2 TIFFANY, REAL PROPERTY (3d ed. 1939) 232, § 435, n. 92.

[28] 4 MD. CODE (1957) Art. 45. § 1 et seq.

[29] Routzahn v. Cromer, 220 Md. 65, 150 A. 2d 912 (1959); Lissau v. Smith, 215 Md. 538, 138 A. 2d 381 (1958); Columbian Carbon Co. v. Knight, 207 Md. 203, 114 A. 2d 28 (1955) (Lease executed by the husband alone on property held by tenants by the entirety held void when made, but the husband was estopped from claiming its invalidity after the divorce of the co-tenants); Carlisle v. Parker, 38 Del. 83, 188 A. 67 (1936); Richart v. Roper, 156 Fla. 822, 25 So. 2d 80 (1946); Sharp v. Baker, 51 Ind. App. 547, 96 N.E. 627 (1911); O'Malley v. O'Malley, 272 Pa. 528, 116 A. 500 (1922); Smith v. Smith, 200 Va. 77, 104 S.E. 2d 17 (1958).

[30] King v. Greene, 30 N.J. 395, 153 A. 2d 49 (1959); Goodrich v. Village of Otego, 216 N.Y. 112, 110 N.E. 162 (1915).

[31] Rickenbacker v. Zimmerman, 10 S.C. 110, 30 Am. Rep. 37 (1878) cited in principal case, p. 236.

[32] Hutson v. Hutson, 168 Md. 182, 177 A. 177 (1935).

[33] Marburg v. Cole, 49 Md. 402, 33 Am. Rep. 266 (1878).

[34] Hutson v. Hutson, supra, n. 32.

[35] Stieff Co. v. Ullrich, 110 Md. 629, 73 A. 874 (1909); Marburg v. Cole, *supra*, n. 33; Tyler v. U.S., 281 U.S. 497 (1930) (stating Maryland law);

therefore, not subject to the application of the doctrine of advancements.

However, the principal case does not fall within the usual advancement situation where property is transferred to a child by one parent. In the instant case, *both* the husband and wife joined in the execution of the deed to the defendant. Although neither spouse, acting alone, had the power to convey or encumber any interest in the property held by the entireties,[36] the co-tenants, acting together and voluntarily, could validly alienate such property.[37] Therefore, the deed executed by both spouses which named defendant as the grantee transferred an alienable estate.

The Court of Appeals, however, based its decision upon the absence of the prerequisite of inheritability in the instant case. While this factor is lacking in any case where parties hold property by the entireties, and the Court was correct in its application of the theoretical aspect of the law, ancient technicalities should not be employed to bind all future decisions in this area of advancements. The Court, in the proper case, should find an advancement, if the policy prerequisites for an advancement are otherwise present,[38] notwithstanding the fact that property was held by the entireties and therefore not technically inheritable. Where the intent to make an advancement is clear on the part of both spouses, this intent should be given effect. If not, the policy of the legislature to provide for equality of distribution among the heirs of the intestate will be defeated.

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[1] 223 Md. 606, 165 A. 2d 886 (1960).