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ANTHONY CLIFFORD EDWARDS, Executor of the Estate of Alice Maud Mary Edwards, deceased (*Plaintiff*) APPELLANT;

*April 2
June 26

AND

EDNA PEARL BRADLEY (*Defendant*) ..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Trusts and trustees—Resulting trusts—Creation of joint bank account—Presumptions from relationship.

Where a joint bank account is created with moneys that are the sole property of one depositor, the other holder of the account, if he acquires the legal title to the moneys through the death of the original depositor, *prima facie* holds those moneys on a resulting trust for the estate of the deceased depositor. There is no presumption of advancement where such an account is opened by a mother in the joint names of herself and her child, although in the case of a widowed mother very little evidence will be required in such circumstances to establish the intention of a gift. If the evidence is insufficient to show such an intention, effect must be given to the trust.

APPEAL from a judgment of the Court of Appeal for Ontario (1) reversing a judgment of Barlow J. (2). Appeal allowed.

R. M. Willes Chitty, Q.C., and *R. E. Shibley,* for the plaintiff, appellant.

W. B. Beardall, Q.C., for the defendant, respondent.

The judgment of Kerwin C.J. and Taschereau J. was delivered by

THE CHIEF JUSTICE:—It is unnecessary to decide in this appeal whether what was done was invalid as a testamentary disposition. There are cases where it has been held that, there being a present gift of the amount on deposit, *The Wills Act* did not apply: *Young et al. v. Sealey* (3), where Romer J. discussed several decisions in the Irish Free State, in New Brunswick and in Ontario, including *Re Reid* (4). Reference might also be made to *Russell v. Scott* (5), a decision of the High Court of Australia.

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke and Cartwright JJ.

(1) [1956] O.R. 359, 2 D.L.R. (2d) 382.
(2) [1955] O.W.N. 895.
(3) [1949] Ch. 278, [1949] 1 All E.R. 92.
(4) (1921), 50 O.L.R. 595, 64 D.L.R. 598.
(5) (1936), 55 C.L.R. 440.

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Kerwin C.J.

The circumstances of this case and particularly the fact that the respondent, a daughter of Mrs. Edwards, lived with her husband in Michigan, many miles from her mother's residence, do not permit any presumption of advancement to arise and, therefore, the ordinary rule applies that there was a resulting trust in favour of the mother, unless the evidence is sufficient to overcome that presumption. There is nothing in the document signed for the bank by the mother and daughter to cut down the former's equitable interest. It has been pointed out in *Re Mailman Estate* (1) and *Niles et al. v. Lake* (2) that documents of this nature are drawn by the bank and cannot affect the resulting trust. That does not mean that where the facts warrant it a finding may not be made that there was a present gift and that the presumption as to a resulting trust was overcome, but here the evidence falls short of what is required.

The appeal should be allowed and the judgment of the Court of Appeal set aside. The judgment of the trial judge should be restored, except that the appellant's costs of the action and trial should be paid out of the money in the bank as between solicitor and client. The appellant is also entitled out of the money in the bank to his costs as between solicitor and client of the appeal to this Court, but there should be no other order as to costs in this Court. The respondent should pay the appellant's costs as between party and party in the Court of Appeal, leaving the appellant, as executor, to recover the difference between such party-and-party costs and his solicitor-and-client costs of that appeal out of the money in the bank.

The judgment of Rand and Locke JJ. was delivered by

RAND J.:—The question in issue is whether the deceased mother of the parties, Alice Maud Edwards, on the occasion of having a bank account then in her name transferred to the names of herself and her daughter, Edna Bradley, the respondent, intended that the daughter should thereby obtain a beneficial interest either of a present joint tenancy or in the nature of a remainder. This depends upon the circumstances surrounding the transfer and these must then be examined.

(1) [1941] S.C.R. 368, [1941] 3 D.L.R. 449.

(2) [1947] S.C.R. 291, [1947] 2 D.L.R. 248.

The mother, 80 years of age and in reasonably good health, was a widow with three children, two sons and the respondent. The husband had died in 1950, leaving her the sole beneficiary of his estate. Included in that estate was the home farm on which the widow continued to live. The son Anthony, the appellant, lived on his own farm 1½ miles distant and the daughter, married, at Pontiac, Michigan. The homestead was rented and farmed by Anthony, for which he paid his mother $500 a year.

At the time of transferring the account the daughter's husband was building a home in Pontiac and the common expectation seems to have been that in the course of time the mother would be living with them in it. In anticipation of that, the mother apparently thought she should make a contribution towards the cost and during this period, the precise date of which does not appear, had offered assistance which at the time the daughter declined.

On January 30, 1952, the mother and daughter went to the bank and, as mentioned, had the account changed to their joint names. On April 8 following, the daughter approached the mother, saying "The money you offered me, I could use it now." A cheque on the account was thereupon given to her signed by the mother for $500. Later, on July 28, 1952, they went together to the bank and the same amount was drawn out by the mother and given the daughter. On this occasion a document, intended to confirm the fact of a gift to the daughter of both sums, was signed by the mother to this effect:

I gave Edna Bradley my daughter on April 8th $500 also on July 29 $500 to help building a home on Dixie Hi-Way. At any time if I am not able to live alone or sick I can go to live with them.

Mrs. Alice M. M. Edwards

This was endorsed on the back by the former wife of the son Garnet as follows:

July 29th, 1952.

At the time this money was given to Edna, Mrs. Edwards knew what she was doing and it was her wish that Edna have it free of any ties.

Hazel Edwards

The memorandum was given at the request of the daughter in these words: "I don't want there to be any fuss about this at all, would you mind signing a statement to the effect that this is a gift and not a loan."

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No cheque was drawn on the account by the daughter while the mother lived. The mother died on January 9, 1953. On August 3, 1951, six months before the joint account was opened, she had made a will, afterwards probated, by which the farm was devised to the son Anthony subject to the payment of (a) $1,500 to her stepson, Ray Edwards, (b) $1,500 to the respondent and (c) $1,500 to her son Garnet. After providing $100 each for four granddaughters, to be paid out of the personal estate, the residue was divided equally between her stepson, Ray, and the three children, the respondent, the appellant and Garnet. There is no evidence of personal property of any value apart from the bank account. On January 30, 1952, the amount to the credit of the account was $6,195.63 and at her death it was $4,612.79. Her only income was the rent from the farm and the bank interest.

The judgment of the Court of Appeal (1), reversing that of the trial judge (2), and finding that the joint account was intended to vest beneficially in the daughter, nullifies the residuary bequest as well as those to the grandchildren. It will be seen from the charge of $4,500 against the farm and the division of the residue that, even with an additional benefit accruing to the son Anthony from the farm, the amount of which, if any, is not shown, the intention of the testatrix was to distribute her estate in rough equality between the three children and the stepson. Is the conclusion that within six months after that testamentary act, she deliberately divested herself of any residual property and completely distorted the distribution provided by the will, a reasonable inference from the circumstances shown?

That she was a woman of character, strength and independence is quite evident. Enjoying good health, she undoubtedly looked to a not far distant day when she would accept the welcome home of her daughter, the acknowledgment of which was made clear by her contribution to its cost; but there was also the possibility that at any time she might be stricken with incapacity. Obviously she desired to be a burden to no one and her resources were sufficient to that purpose. It was what one might easily expect that she

(1) [1956] O.R. 359, 2 D.L.R. (2d) 382.

(2) [1955] O.W.N. 895.

should provide against the day when she would be unable to attend to her banking affairs as she had done; and that, I am satisfied, was the purpose of the joint account.

It is just as clear that the daughter had no notion of having received any gift by the fact of the account or of having the right to touch it for her own purposes while her mother lived. The requests for the advances and the exclusive checking on the account by the mother themselves put this beyond any doubt, and the memorandum of July 9 concludes it.

No present benefit for the daughter was, then, intended by formal change in the account. Is there any justification for inferring that the mother intended the money to be exclusively hers while she lived but at her death to belong to the daughter? I can discover not an iota of matter on which can be based the conclusion that the mother, giving so many evidences of parental regard to the claims of all her children as well as of the stepson, had in mind to strip the residuary clause of all content and meaning: that would be contrary to every probability. The care taken to protect the daughter against an adverse inference from the two cheques, evidenced by the memorandum, shows how sensitive she was to the effect on the children of the distribution of what she owned; the legacy of $1,500 in addition to one-third of the residue to the daughter had been overbalanced to the extent of $1,000, but this had a special justification; to add to that the remaining funds in the bank and to wipe out the residue, including, as the evidence goes, the $400 to the grandchildren, would, as I read her mind, have been something utterly repugnant to her.

I would, therefore, allow the appeal and restore the judgment of Barlow J., including the costs of both parties to be paid out of the money in the bank, those of the appellant as between solicitor and client. In this Court the appellant only will be entitled to costs, and as between solicitor and client to be paid out of the same fund. The respondent will pay the appellant's costs as between party and party in the Court of Appeal, the appellant recovering the difference between those and solicitor-and-client costs out of the same fund.

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CARTWRIGHT J.:—I have had the advantage of reading the reasons of the Chief Justice and those of my brother Rand and agree with their conclusion that this appeal must be allowed. I also agree that it is unnecessary in this case to decide the question dealt with by Romer J. in *Young et al. v. Sealey* (1) as to whether the view of the law taken in *Owens v. Greene; Freeley v. Greene* (2) or that taken in *Re Reid* (3) should be preferred.

Assuming that on the death of the late Alice Maud Edwards the respondent had the legal right to withdraw the money on deposit in the joint bank account and on making the withdrawal would have the legal title to the money withdrawn, the question is whether she is beneficially entitled to that money or holds it in trust for her mother's personal representative.

As all the moneys deposited in the account were the sole property of the mother the daughter would *prima facie* hold the fund to which she has the legal title on a resulting trust for the mother's estate. In *Dyer v. Dyer* (4), Eyre C.B. says:

> It is the established doctrine of a Court of equity, that this resulting trust *may be rebutted* by circumstances in evidence.
>
> The cases go one step further, and prove that *the circumstance of one or more of the nominees being a child or children of the purchaser, is to operate by rebutting the resulting trust*; and it has been determined in so many cases that the nominee being a child shall have such operation as a circumstance of evidence, that we should be disturbing land-marks if we suffered either of these propositions to be called in question, namely, that such circumstance shall rebut the resulting trust, and that it shall do so as a circumstance of evidence . . . Considering it as a circumstance of evidence, there must be, of course, evidence admitted on the other side.

Dyer v. Dyer was a case of father and son. In my opinion the result of the decisions in cases of mother and child is correctly summarized in the following passage in 18 Halsbury's Laws of England, 3rd ed. 1957, s. 736, p. 387:

> There is no presumption of a gift where the purchase or investment is made by a mother, even though living apart from her husband, or a widow, in the name of her child or in the joint names of herself and her child, though in the case of a widowed mother very little evidence to prove the intention of a gift is required . . .

(1) [1949] Ch. 278, [1949] 1 All E.R. 92.
(2) [1932] I.R. 225.
(3) (1921), 50 O.L.R. 595, 64 D.L.R. 598.
(4) (1788), 2 White & Tud. L.C., 9th ed., 749 at 750-1.

Giving full effect to the existence of the relationship of mother and daughter, as a circumstance of evidence, I agree with the Chief Justice and my brother Rand that the proper inference to be drawn from all the evidence in the case at bar is that it has not been shown that the mother intended to pass the beneficial interest to the respondent either in her lifetime or on her death. It necessarily results from this finding of fact that the appeal succeeds.

I have found the question as to what disposition should be made of the costs of the proceedings a difficult one. If I alone were called upon to decide it I would have thought that the costs of both parties throughout should be paid out of the fund in question by reason of the following circumstances: The deceased mother, through no fault of the respondent, made arrangements whereby on her death the legal title to the fund appeared to be vested in the respondent, leaving it to be determined by an examination of all the surrounding circumstances whether the respondent was intended to have the beneficial interest also. The learned trial judge (1) was of opinion that the mother did in fact intend that on her death the respondent should take the fund beneficially, but for reasons of law decided he could not give effect to this intention. The Court of Appeal (2), while taking a similar view of the evidence, reached a different conclusion as to the law and allowed the appeal. In this Court for the first time in the proceedings a different view has been taken as to the result of the evidence and we are restoring the judgment of the learned trial judge but for reasons differing from those on which he proceeded. It appears to me that the grounds for ordering all costs to come out of the fund are at least as strong as those which were found sufficient by the majority of this Court in *Niles et al. v. Lake* (3).

However, as my view on this branch of the matter is not shared by the other members of the Court, I concur in the disposition of the appeal proposed by the Chief Justice.

Appeal allowed.

(1) [1955] O.W.N. 895.
(2) [1956] O.R. 359, 2 D.L.R. (2d) 382.
(3) [1947] S.C.R. 291, [1947] 2 D.L.R. 248.

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v.
BRADLEY

Cartwright J.

Solicitors for the plaintiff, appellant: Myers, McDonnell & Mitchell, Chatham.

Solicitors for the defendant, respondent: Bedford, Beardall & Pickett, Chatham.

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*PRESENT: Rand, Locke, Cartwright, Abbott and Nolan JJ.