

1968
 *May 13, 14
 June 24

ALBERT STERN (*Plaintiff*) APPELLANT;

AND

JACK SHEPS, PHILLIP KOSLOVSKY,
 BENJAMIN COHEN and NATIONAL
 TRUST COMPANY LIMITED, as
 Executors and Trustees of the Last
 Will and Testament of MINNIE
 STERN (*Defendants*) } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Husband and wife—Pre-nuptial agreement—Mutual waiver of rights under the Dower Act—Whether contrary to public policy—The Dower Act, R.S.M. 1954, c. 65 [now 1964, c. 16].

Contracts—Uberrimae fidei—Not all pre-nuptial agreements are to be categorized as uberrimae fidei.

The appellant, who was a bachelor aged 57, and a widow agreed to get married and two days prior to the marriage they entered into a pre-nuptial agreement whereby the parties agreed, *inter alia*, to mutually renounce all rights which would arise upon their marriage by virtue of *The Dower Act*, R.S.M. 1954, c. 65. The parties were married on January 31, 1957, and lived together as man and wife until the wife died on May 1, 1964. She left a will dated July 3, 1957. Her estate was valued for taxation purposes at \$228,000. Nothing was left to the appellant. He purported to take under *The Dower Act*, R.S.M. 1954, c. 65, then in force under which he claimed to be entitled to a life estate in the homestead of the deceased and also to one-third of the net estate.

An action brought by the appellant to set aside the pre-nuptial agreement was dismissed at trial, and on appeal the trial judgment was upheld by the Court of Appeal. An appeal was then brought to this Court. The substantial ground argued in the Court of Appeal and in this Court was that the pre-nuptial agreement of January 29, 1957, was void as being contrary to public policy.

Held: The appeal should be dismissed.

The Court adopted the reasons of Monnin J.A. who had dealt fully and correctly with the public policy issue.

APPEAL from a judgment of the Court of Appeal for Manitoba¹, affirming a judgment of Bastin J. Appeal dismissed.

* PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

¹ (1966), 58 W.W.R. 612, 61 D.L.R. (2d) 343.

Maurice J. Arpin, Q.C., for the plaintiff, appellant.

Francis C. Muldoon and Rémi Lafrenière, for the defendants, respondents.

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The judgment of the Court was delivered by

HALL J.:—The appellant Albert Stern was a bachelor age 57 who, in January 1957, was the manager of a large department store in St. Paul, Alberta. He learned through a traveller who came to the store of one Mrs. Minnie Koslovsky, a widow, who resided in Winnipeg. The appellant had not known of her prior to this. He telephoned Mrs. Koslovsky and she suggested that he should come to Winnipeg to see her. They had several conversations in which the appellant states that he told Mrs. Koslovsky he would want from \$25,000 to \$30,000 to start a business in Winnipeg. She promised, according to appellant, that she would provide \$25,000. They agreed to get married. The appellant returned to St. Paul, resigned his position, shipped his personal belongings to Winnipeg and moved there.

On January 29, 1957, two days prior to the marriage, the appellant and Mrs. Koslovsky entered into a pre-nuptial agreement which is the subject of this litigation. The agreement which was under seal was executed in the office of Mrs. Koslovsky's solicitor, Mr. David Levin, Q.C. It contained covenants as follows:

1. The said Minnie Koslovsky and the said Albert Stern hereby covenant and agree with each other that during their marriage, each of them shall be completely independent of the other as regards the enjoyment, control, administration and disposal of all property, both real and personal, whether owned at the commencement of the said marriage or acquired thereafter.

2. The said Albert Stern for himself, his heirs, executors, administrators and assigns respectively, further covenants and agrees with the said Minnie Koslovsky that if the said Minnie Koslovsky should predecease him, he will, and does hereby waive, remise, release, renounce and stands debarred of all right, title, interest, claim and demand whatsoever to the present and/or future estate of the said Minnie Koslovsky, her heirs, executors, administrators and assigns, both at law and in equity or by statute or otherwise howsoever, whether in possession or expectancy or whether by or under the Dower Act, R.S.M. 1954, Cap. 65, and amendments thereto, the Devolution

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of Estates Act, R.S.M. 1954, Cap. 63 and amendments thereto, The Testator's Family Maintenance Act, R.S.M. 1954, Cap. 264 and amendments thereto, and/or any other Act or law whatsoever and wheresoever, either now or hereafter in force, and whether or not the said Minnie Koslovsky predeceases testate or intestate the said Albert Stern, including all rights of election to take under the Will of the said Minnie Koslovsky or not, and any life estate in any homestead of the said Minnie Koslovsky, and of, in, to and out of which the said Albert Stern now has or may hereafter have any right, title, estate, claim or interest.

3. The said Albert Stern hereby covenants and agrees with the said Minnie Koslovsky that neither he nor his heirs, executors, administrators, trustees or assigns, nor any person or persons, or corporations whatsoever for him and in his name or on his behalf shall at any time hereafter bring or carry on or prosecute any or any manner of actions, causes of actions, suits, proceedings, claims or demands whatsoever or howsoever against the said Minnie Koslovsky, her estate or effects, or for or by reason or in respect of any act, matter, cause, or thing waived, remised, released, renounced or barred by this indenture.

Minnie Koslovsky covenanted to the same effect with the appellant.

The appellant, who at one time considered qualifying for the law profession, had attended McGill University for one year. He acknowledged that he had read the agreement and understood it and that it was signed of his own free will and without any compulsion.

The parties were married on January 31, 1957, and lived together as man and wife until the wife died on May 1, 1964. She left a will dated July 3, 1957. Her estate was valued for taxation purposes at \$228,000. Nothing was left to the appellant. He purported to take under *The Dower Act*, R.S.M. 1954, c. 65, then in force under which he claimed to be entitled to a life estate in the homestead of the deceased, 25 O'Meara Street, Winnipeg, where the parties had cohabited since their marriage. This property was valued at \$17,500 and he also claimed to be entitled to one-third of the net estate.

He brought action against the respondents as executors and trustees of the last will and testament of Minnie Koslovsky-Stern claiming:

- (a) A declaration that the document of the 29th of January, 1957, is contrary to public policy, is null and void and of no effect.
- (b) A declaration that the plaintiff's signature to the said document was procured by the undue influence and misrepresentation of the

deceased and ought to be set aside, either wholly or as to the portions in conflict with the plaintiff's rights under sections 12, 13, 14 and 22 of *The Dower Act*.

- (c) Alternatively, rescision of the said document of the 29th of January, 1957, or of so much thereof as purports to affect the plaintiff's rights under *The Dower Act*, on the grounds of undue influence and misrepresentation.
- (d) A declaration that the plaintiff is entitled to a one-third interest in the deceased's net estate and to a life estate in the deceased's homestead, in addition, pursuant to *The Dower Act*.

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The action was tried by Bastin J. and his judgment was upheld by the Court of Appeal for Manitoba¹. Bastin J. found as follows:

The first ground is that the covenant by plaintiff waiving any claim to his wife's property, contained in the agreement (Ex. 1), is without consideration. I hold that the consideration to support this covenant is the similar covenant by Mrs. Minnie Koslovsky. There was great disparity between the rights being relinquished by plaintiff and those being given up by Mrs. Koslovsky; but consideration, even if it appears inadequate, is effective in the absence of fraud or undue influence.

The second ground is a claim by the plaintiff that by a verbal agreement made prior to the pre-nuptial agreement, Mrs. Koslovsky promised she would give the plaintiff between \$20,000 and \$25,000 to establish a business in Winnipeg and that she failed to do so. According to plaintiff, Mrs. Koslovsky explained to him that she required the pre-nuptial agreement to satisfy her relatives but that it would not govern her relationship with the plaintiff. It is in evidence that the plaintiff received from his wife a cheque dated March 26, 1957, for \$2,000; another dated April 10, 1957, for \$2,000; and a third dated May 1, 1957, for \$1,000—a total of \$5,000—which he claims was not a gift but a loan, which he has since repaid with interest. It is the contention of plaintiff that this verbal agreement to give him \$20,000 or \$25,000 was part of the consideration for him signing the pre-nuptial agreement and that his wife's failure to make the gift was a repudiation of the written agreement. If any such promise were made, plaintiff waived its performance by accepting and repaying the loan of \$5,000. There is no evidence that plaintiff ever made a demand on his wife to perform such a promise and this renders his story quite improbable, and I reject it.

His third ground is that the pre-nuptial agreement is contrary to public policy and to the intent of *The Dower Act*. At common law an adult is presumed to be *sui juris* and entitled to contract freely. This is a fundamental principle of law which can only be affected by express legislation. I can find nothing in *The Dower Act* to show an intention on the part of the Legislature to interfere with the freedom of spouses to contract themselves out of the benefits of this Act.

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¹ (1966), 58 W.W.R. 612, 61 D.L.R. (2d) 343.
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Another ground is that of undue influence. The relationship of husband and wife does not create a presumption of undue influence, and in any case plaintiff has admitted he understood the terms of the agreement and entered into it without any compulsion and of his own free will.

The final ground is that in April 1959 plaintiff and his wife verbally agreed to cancel the pre-nuptial agreement and that, relying on this verbal agreement, he made a will on April 26, 1959, under which his wife was to benefit. The existence of such a verbal agreement is a matter of credibility and I consider that all the surrounding circumstances make this story improbable. The fact that his story is improbable in the circumstances, the existence of discrepancies in his evidence, and his demeanour, all combine to make his story as to this agreement completely incredible.

The substantial ground argued in the Court of Appeal and in this Court was that the pre-nuptial agreement of January 29, 1957, was void as being contrary to public policy. The findings of Bastin J. on the other points are fully supported by the evidence.

Monnin J.A. dealt fully and correctly with the public policy issue and I adopt his reasons. I do not think that I can usefully add anything to what he has said on this issue.

It was also urged that the pre-nuptial agreement was voidable on the ground that it was an agreement classed as a contract *uberrimae fidei*. Freedman J.A. appears to accept the proposition that the agreement in question here was in that class although also holding that the appellant had in no way been misled. I cannot accept the view that all pre-nuptial agreements are to be categorized as *uberrimae fidei*. *Williams v. Moody Bible Institute of Chicago*², cited by Freedman J.A., deals with an agreement in which a wife was not given full disclosure and in fact was misled by her prospective husband as to his assets and financial condition at the time she entered into the pre-nuptial agreement. There well may be a substantial difference between a case such as *Williams* and a case where it is the husband and not the wife who is attacking the agreement on the ground of failure to disclose and particularly in the case of a husband to a marriage of convenience who knows and agrees in advance that he will not participate in the

² [1937] 2 W.W.R. 316, 4 D.L.R. 465.

wife's estate. I do not find it necessary to go into this phase of the matter in view of the finding by Freedman J.A. that the appellant in this case was not in fact misled. 1968
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I would dismiss the appeal with costs.

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Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Arpin, Rich & Houston, Winnipeg.

Solicitors for the defendants, respondents: Graffton, Dowhan, Muldoon & Lafrenière, Winnipeg.
