

October 1967

## Husband and Wife - Marital Rights - Voluntary Conveyance of Real Property by Eigh Party to a Marriage Contract without Knowledge of Other Is Fraud and Conveyance Will Be Set Aside as Void

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### Recommended Citation

Aladar F. Siles, *Husband and Wife - Marital Rights - Voluntary Conveyance of Real Property by Eigh Party to a Marriage Contract without Knowledge of Other Is Fraud and Conveyance Will Be Set Aside as Void*, 44 Chi.-Kent L. Rev. 199 (1967).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol44/iss2/18>

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combination of functions has been tolerated as not violative of due process largely for the practical reason that any separation of the functions would require a complete change of the entire administrative system.

For example, to help insure fair hearings on the federal level, the Federal Administrative Procedure Act,<sup>30</sup> § 5 (c) provides for internal separation, that is, while the agency itself performs all the aforementioned functions, the subordinate agency personnel who act as deciders of a particular case are to have no part in its investigation and prosecution.

Thus, it is quite clear that the principles adopted by the majority in deciding the *Pickering* case conform to those postulated in the earlier decisions. The courts are loath to interfere with the actions of local school boards and will apparently do so only when they are convinced that a school board has acted arbitrarily in a particular case. The court was unimpressed with the free speech argument which *Pickering* attempted to raise and as such suggested that a teacher's freedom might, of necessity, have to be compromised in favor of the broader social need of an efficient and harmonious school system. As has so often been true, the court was confronted with a situation wherein it had to resolve a clash between the interests of the individual and those of the larger community. This writer believes that the court correctly chose to protect the greater community interest.

EDWARD A. HOFFMAN

HUSBAND AND WIFE—MARITAL RIGHTS—VOLUNTARY CONVEYANCE OF REAL PROPERTY BY EITHER PARTY TO A MARRIAGE CONTRACT WITHOUT KNOWLEDGE OF OTHER IS FRAUD AND CONVEYANCE WILL BE SET ASIDE AS VOID. In *Michna v. May*, 80 Ill. App. 2d 281, 225 N.E.2d 391 (1st Dist. 1967), the Appellate Court for the First District of the State of Illinois was presented with the question of whether a voluntary conveyance of real property by the prospective husband without knowledge of the prospective wife was a fraud on the marital rights of the prospective wife. The court held the conveyance was a fraud on the wife's marital rights and was without effect.

The plaintiff-widow was engaged to be married on December 19, 1955. On January 10, 1956, her intended husband executed a land trust, whereby the trustee held title to the real estate for the benefit of the grantor for life and, on his death, the remainder would go to his sisters, the defendants. The parties were married on January 23, 1956, and lived together until May 6, 1961, when the husband died, leaving a will naming the plaintiff as his sole beneficiary and executor. Upon learning of the trust agreement, the plaintiff filed a complaint seeking to set the agreement aside on grounds of

<sup>30</sup> 60 Stat. 237, 5 U.S.C. §§ 1001-1011 (1946).

fraud. The Circuit Court of Cook County held the conveyance to be null and void. On appeal, the appellate court affirmed the decision.

At common law, married women were incapable of holding property in their own name. At common law, the husband acquired large interests in the real property of the wife.<sup>1</sup> This interest, known as the husband's marital right, lasted only during the marriage and expired on the death of the wife. Consequently, a conveyance of real property by a woman about to marry, made without knowledge of the intended husband,<sup>2</sup> with intent to defeat his marital right, was a fraud upon him and he could have the transfer set aside after the marriage by a suit in equity.<sup>3</sup> At common law, fraudulent conveyances were made by the woman either by transferring her property to a third party for her sole and separate use,<sup>4</sup> or by changing the form of the property, so as to reduce the extent of the husband's interest therein. Modern statutes, however, have modified the rights of the husband to his wife's property,<sup>5</sup> and there has been less occasion for practicing fraud upon the husband.

United States equity courts at an early date extended to the wife the same rights that her husband had at common law.<sup>6</sup> Today, a secret transfer of realty by the prospective husband may be upset as a violation of the wife's marital rights.

The marital rights of the wife in Illinois are her rights to dower and homestead.<sup>7</sup> They are inchoate rights and attach on death as to all property held by the husband during coverture. In order for the wife to give up these rights, she must join with the husband in any conveyance. Thus, it can be seen that a conveyance on the "eve of marriage" by the husband without the knowledge of the wife would deprive the wife of her dower and homestead interest in that specific property and it has been therefore held that such a conveyance is *prima facie* evidence of fraud of these marital rights.<sup>8</sup>

<sup>1</sup> 2 Kent Comm. 135, *Grute v. Loonoft*, Cro. Eliz. 287 (1592). In that case, the husband did not become owner of the wife's real estate, but during marriage was entitled to the enjoyment of his wife's chattels and could assign, mortgage or otherwise dispose of them during his life.

<sup>2</sup> There can be no presumption of fraud where the intended husband has knowledge or assents to the disposition. *Hunt v. Mathews*, 1 Vern 408 (1686), *Slocombe v. Glubb*, 2 Brown Ch. 544 (1789).

<sup>3</sup> *Ramsey v. Joyce*, McMul. Eg. (S. Car.) 236, 37 Am. Dec. 550 (1841); *Waller v. Armistead*, 2 Leigh (Va.) 11, 2 Am. Dec. 594 (1830).

<sup>4</sup> See *England v. Downs*, 2 Beavan 522 (1840), where the wife during a marriage contract secretly conveyed away all her property in such a manner as to defeat her husband's marital right, but secured to herself separate use of the property.

<sup>5</sup> Ill. Rev. Stat. ch. 68, § 9 (1874).

<sup>6</sup> *Chandler v. Hollingsworth*, 3 Del. Ch. 99 (1867).

<sup>7</sup> *Knights v. Knights*, 300 Ill. 618, 133 N.E. 377 (1921).

<sup>8</sup> *Dunbar v. Dunbar*, 254 Ill. 281, 98 N.E. 563 (1912). The conveyance made before marriage in fraud of the wife is comparative to one made to defraud creditors of the grantor and both would be set aside.

In announcing its rule, the court in *Michna* purported to follow the earlier Illinois Supreme Court case of *Moore v. Moore*.<sup>9</sup> In that case, a widow alleged that her deceased spouse conveyed title to a certain farm on the "eve" of their marriage, without her knowledge or consent, to his son and two daughters by a previous marriage. She asked that such conveyance be set aside as it deprived her of her marital rights. The deed had been executed and recorded ten months before the marriage. The court stated:

It is the settled law in the state that a voluntary conveyance by either party to a marriage contract of his or her real property, without the knowledge of the other and on the eve of marriage, is a fraud upon the marital rights of the other party, and such conveyance may be set aside as fraudulent and void as against the party whose marital rights are precluded thereby.<sup>10</sup>

One of the problems is what is considered the "eve of marriage." There can be no arbitrary line of demarcation as to the time between a fraudulent and valid transfer; therefore, the court determines what is the "eve of marriage" by the special circumstances involved in each case. The length of time between the transfer and the marriage is one of the factors considered. Thus, in *Freeman v. Hartman*,<sup>11</sup> a voluntary conveyance of a one-sixth interest in a farm made three days before marriage without the knowledge of the prospective spouse was held to be on the "eve." However, even a long period of time has been held to be on the "eve of marriage." This is illustrated aptly in *Jarvis v. Jarvis*.<sup>12</sup> In that case the conveyance was made twenty-two months prior to the marriage. Notwithstanding this considerable length of time, the court held the conveyance to be on the "eve of marriage" as the husband was actually intending marriage at the time.

Another criterion used by the courts in determining whether a conveyance was made on the "eve of marriage" is whether the prospective husband was contemplating marriage at the time he made the conveyance.<sup>13</sup> Clearly, if the husband has no intent, even remotely, to marry, there can be no fraud on the wife. In *Ellet v. Farmer*,<sup>14</sup> where there was a transfer by a prospective spouse to his nephew and niece, his closest relatives, two months after his first wife's death and a year prior to his second marriage, the court said,

Manifestly, he did not then contemplate marriage with plaintiff who was living with her third husband, Harry Hart, and, who, so far as the record discloses, was in excellent health. The evidence adduced by plaintiff does not even remotely tend to show an intent by Ellet to marry any particular person or a general intent to

<sup>9</sup> 15 Ill. 2d 239, 154 N.E.2d 256 (1958).

<sup>10</sup> *Id.* at 241, 154 N.E.2d at 257.

<sup>11</sup> 45 Ill. 57 (1867).

<sup>12</sup> 286 Ill. 478, 122 N.E. 121 (1919).

<sup>13</sup> See also, *Lill v. Lill*, 18 Ill. 2d 393, 164 N.E.2d 12 (1961).

<sup>14</sup> 384 Ill. 343, 51 N.E.2d 570 (1944).

marry some person whom he had not yet met. In short, Ellet gave his property to his nearest relatives, the special objects of his affection, at a time when he had the undoubted right so to do.<sup>15</sup>

However, it has been held that the prospective husband need not have already picked a bride, to be considered as making a conveyance on the "eve of marriage." Thus, in *Higgins v. Higgins*,<sup>16</sup> the father gave a deed to his son. He thereafter went to New York and was introduced to his prospective wife. He represented to her that he was a large landowner when in fact he no longer owned any land. On the strength of these representations the plaintiff married. The court stated that although the husband had never met the plaintiff, he did contemplate this second marriage and the deed was made with a view to that event.<sup>17</sup>

Once a prima facie case is established, the only way to defeat it is for the grantee to prove that the conveyance was made for a valid reason and not in fraud of the spouse.<sup>18</sup> A valid reason was found in *Daniher v. Daniher*.<sup>19</sup> In that case, the husband's son by a former marriage had been in possession of the farm involved for three years before his father's second marriage and had made permanent and lasting improvements upon it. The court held that the father had a duty, as consideration for the improvements, to make the conveyance and that the son had sustained the burden of showing that the transfer was for a valid reason.<sup>20</sup>

The decision in the *Michna* case is in accord with the holdings of the vast majority of states.<sup>21</sup> However, the decision raises certain questions. The

<sup>15</sup> *Id.* at 349, 51 N.E.2d at 573.

<sup>16</sup> 219 Ill. 146, 76 N.E. 86 (1905).

<sup>17</sup> The court in the *Higgins* case, *supra* note 16, reversed and remanded the decision after a trial court decision in favor of the plaintiff. The court denied relief because the evidence presented at the trial was that the deed was made prior to the marriage and was thus at variance with the plaintiff's pleadings which indicated the deed was made subsequent to marriage.

<sup>18</sup> *Supra* note 13. There is some amount of controversy as to what constitutes a prima facie case in the various jurisdictions. In *Smigell v. Brod*, 366 Pa. 612, 79 A.2d 411 (1951), the court held that mere proof of a conveyance made during an engagement without the knowledge of the wife does not constitute a prima facie case, but the party complaining must actually prove fraud. See also, *Tracy v. Thatchen*, 135 Kan. 615, 11 P.2d 691 (1932) where when a wife could show no fraudulent intent, the evidence was held insufficient.

<sup>19</sup> 201 Ill. 489, 66 N.E. 239 (1903).

<sup>20</sup> *Accord*, *Lill v. Lill*, *supra* note 13, where the husband had conveyed property to his son one year and five months before his second marriage. The court held the conveyance valid. Although the conveyance was prima facie fraudulent in Illinois, the proof by the son that the father had no general intent to marry at the time of the conveyance and that it was his intent to provide for his children from a prior marriage, showed that there was no fraud in the conveyance. See also, *Jones v. Jones*, 213 Ill. 228, 72 N.E. 695 (1904), where the Illinois court held that a conveyance given shortly before marriage would not be in fraud of the marital right of the prospective wife when it was given for services rendered by the grantee. But see, *Stathos v. La Salle Nat'l Bank*, 62 Ill. App. 2d 398, 210 N.E.2d 828 (1st Dist. 1965), where the court held that if there was only a possibility of another reason for transferring the property, there may still be a presumption of fraud.

<sup>21</sup> States in accord with rule include: Alabama, Arkansas, Colorado, Delaware, Florida,

court, in holding the conveyance void as a fraud on the wife's marital right, must decide the extent of the wife's interest. Would she be entitled to the entire property or could she only receive her marital interests? The general rule is that the conveyance may be avoided to the extent of the wife's marital right.<sup>22</sup> Some courts hold, however, that in such an action the conveyance will be totally set aside, thereby preserving all rights to the property that the defrauded wife might have had.<sup>23</sup> But, in neither case, does it appear she will receive all the property unless her interest corresponds accordingly.

If the conveyance were set aside completely, what rights would the creditors of the deceased have to the property? After making the conveyance, the husband loses all interest in the property. Thus, since the conveyance was made only to defraud the wife, and the creditors' right to the property depended on the husband's title, it follows that since the husband had by the conveyance forfeited all of his rights to the property, the creditors would not be entitled to share.

The next question to be answered is what are the wife's rights if the husband conveyed to a bona fide purchaser who took for value and without notice of the husband's intent to defraud? As a general rule, the conveyance will not be set aside.<sup>24</sup> However, would not the wife be entitled to a priority in funds given by the purchaser for the property? Seemingly, the equitable finding would hold the wife to be entitled to a claim, ahead of the creditors, in the funds. The reason is that, but for the fraudulent conveyance, these funds never would have been in the husband's estate. They would still be in the form of property, to which the wife would have her marital right in prior to claims by the creditors.

One of the dangers of the *Michna* decision is that wives who feel that they have not been justly provided for after their husband's death can claim they had not knowledge of a conveyance made prior to marriage. This will transfer the burden of proof to the innocent grantee who may be unable to remove the taint of fraud from the conveyance. Such a rule may well have paved the way for fraudulent practices on the part of the wife and other parties.

ALADAR F. SILES

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Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, West Virginia, Wisconsin.

<sup>22</sup> *Martin v. Martin*, 282 Ky. 411, 138 S.W.2d 509 (1940); *Harrison v. Harrison*, 198 Ark. 64, 127 S.W.2d 270 (1939); *Beechley v. Beechley*, 134 Iowa 75, 108 N.W. 762 (1906).

<sup>23</sup> In the case of inchoate dower, the interest is difficult to calculate, and thus some courts feel it better to set aside the conveyance in toto to protect all the wife's interests. *Vondick v. Kirsch*, 216 S.W. 519 (Sup. Ct. Mo., 1919).

<sup>24</sup> *Kelly v. McGraft*, 70 Ala. 75 (1881). If, however, it appears that the purchaser participated in the fraudulent intent of the husband, the conveyance will be set aside. *Freeman v. Hartman*, 45 Ill. 57 (1867).

