Citation: 2018 TCC 76
Date: 20180419
Docket: 2015-3909(IT)G

BETWEEN:

MARILYN ANN ASHWORTH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT
(delivered orally from the bench at
London, Ontario on November 30, 2017)

Graham J.

[1] Marilyn Ashworth has been assessed under section 160 of the *Income Tax Act*. Kevan Ashworth is Ms. Ashworth's husband. They are separated now but were living together in the period in question.

[2] In 2011, Mr. Ashworth transferred his half interest in the family home to Ms. Ashworth. The Minister of National Revenue alleges that, although consideration was provided, there was a $58,682 shortfall in that consideration. At the time of the transfer, Mr. Ashworth owed in excess of that amount to the Minister. Therefore, the Minister has assessed Ms. Ashworth for that amount under section 160.

[3] The sole issue in this appeal is the amount of the consideration that Ms. Ashworth provided in exchange for Mr. Ashworth's half interest in the property. The parties agree that the fair market value of the home was $409,000. They also agree that as part of the transfer Ms. Ashworth assumed Mr. Ashworth's 50 per cent share of the $187,731 mortgage owing on the property. The Respondent says that that is the only consideration that Ms. Ashworth provided. Ms. Ashworth submits that she provided additional consideration in the form of a $103,904 transfer to Mr. Ashworth's wholly owned company and the payment of outstanding charges that Mr. Ashworth had incurred for the benefit of the company

on Ms. Ashworth's credit cards. The sole issue before me is whether that additional consideration was provided.

[4] I am prepared to give my oral judgment on the appeal at this time. I will not be issuing written reasons for judgment.

[5] I heard the testimony and cross-examination of Ms. Ashworth, Mr. Ashworth, and the appeals officer, Didier Bouathinh. I found Ms. Ashworth and Mr. Ashworth to be credible witnesses. Ms. Ashworth had a weak recollection of many of the details, but she provided a reasonable explanation for that weak recollection, and in any event, I find that the documents in this transaction largely speak for themselves. I found Mr. Bouathinh to be a credible witness, but there was very little that was material in his testimony.

[6] Turning first to the line of credit, when the transfer occurred, Mr. Ashworth's company had an outstanding line of credit balance of $103,904 with the TD Bank. The line of credit was secured by a collateral mortgage over the family home. Both Ms. Ashworth and Mr. Ashworth had signed the collateral mortgage. The company was in a poor financial position but was not in default on the line of credit at the time.

[7] As part of the closing of the transaction, Ms. Ashworth borrowed money from Scotiabank and $103,904 of that money was transferred by Ms. Ashworth's solicitors to the TD Bank to pay off the line of credit. Ms. Ashworth takes the position that the $103,904 was partial consideration that she paid to Mr. Ashworth for his half of the property. Mr. Ashworth states that he then directed that the funds be transferred to the company to pay off the line of credit. Since Mr. Ashworth had no control over the monies in Ms. Ashworth's lawyer's trust account, I think a more accurate description of Ms. Ashworth's position would be that Ms. Ashworth agreed to buy Mr. Ashworth's interest in the property for consideration that included the $103,904 on the condition that Mr. Ashworth use the $103,904 to pay off the line of credit and remove the collateral mortgage. The payment went directly from her lawyer's account to TD Bank in order to ensure that that happened.

[8] The Minister's assessing position was that Ms. Ashworth was responsible for half of the collateral mortgage and Mr. Ashworth was responsible for the other half and, thus, that only half of the $103,904 payment can be treated as consideration for the purchase. The Respondent effectively takes the position that $51,952 of the $103,904 amount was a payment to Mr. Ashworth and the remaining $51,952 was

a loan that Ms. Ashworth made to the company with no expectation of repayment in order to ensure that the collateral mortgage was discharged. I do not accept this characterization. It is inconsistent with both the oral and documentary evidence. More importantly, it simply makes no logical sense that the transaction would have occurred in this manner.

[9] Given the choice between the Respondent's characterization of what happened and Ms. Ashworth's characterization, it is clear to me what must have happened. Ms. Ashworth knew that the company was in financial trouble. She also knew that Mr. Ashworth was in financial trouble. The whole point of the transaction was to protect the house from that trouble. The only way for Ms. Ashworth to do that would be to ensure that she paid fair market value for the house and ensure that the collateral mortgage was discharged. She could achieve those goals by paying Mr. Ashworth the $103,904 as partial consideration for the purchase and insisting that he use the funds to pay off the line of credit and discharge the collateral mortgage.

[10] The Respondent would have me believe that Ms. Ashworth instead chose to fail to pay Mr. Ashworth an appropriate purchase price and then borrowed money from Scotiabank on her own to lend to the company to pay off the collateral mortgage. What possible reason could she have for choosing the second alternative? Why would she possibly want to be both a party to a fraudulent conveyance and at the same time make a loan to a company that had no hope of repaying it? She gains nothing from this second alternative. She exposes herself to fraudulent conveyance issues and section 160 issues and, in return, gets nothing but a worthless loan receivable. Given the choice between two conceivable transactions that both fit the documentary evidence, I prefer the one that makes logical sense to have been implemented.

[11] The transaction was completed after Mr. Ashworth consulted with both a bankruptcy trustee and a lawyer. He testified that he accepted the plan proposed by the trustee and then the lawyer executed it.

[12] The theory put forward by the Respondent amounts to Mr. Ashworth having committed a fraudulent conveyance. It seems unlikely to me that the bankruptcy trustee would have advised him to commit such an offence or that a lawyer would knowingly have participated in such a plan. It seems far more likely that the plan proposed and implemented is the one described by Mr. Ashworth, a plan specifically designed not to be a fraudulent conveyance.

[13] The key to my conclusion is the fact that I view the collateral mortgage as being security that Ms. Ashworth granted for the purpose of helping her husband. Ms. Ashworth was not a shareholder of the company. Mr. Ashworth was the sole shareholder. Thus, the security granted would have been for his benefit, not hers. It may have indirectly had the benefit or the potential to increase the family's wealth, but it was nonetheless his investment. Had the company defaulted on the line of credit and had TD Bank then realized on the collateral mortgage, I find that while the bank could have legally seized Ms. Ashworth's interest in the home, as between Mr. Ashworth and Ms. Ashworth, the seizure would have come from his share of the equity as security had been granted for his benefit.

[14] This is not a theoretical allocation of the debt between Ms. Ashworth and Mr. Ashworth. There was sufficient equity in the home at the time of the transaction that this allocation would have been possible. My view of the transaction may have been very different if there had been insufficient equity for Mr. Ashworth to have assumed all of the obligation. In that situation, the portion that could not have been assumed would clearly have been Ms. Ashworth's debt.

[15] I take comfort in my conclusions from the fact that I find the purchase and the payment of the line of credit all happened on the same date as part of the same transaction. This is not a case where a spouse who has received a transfer of a half interest in a home later tries to justify the lack of contemporaneous consideration by pointing to one or more subsequent transactions that took place months or years later. Everything occurred at the same time.

[16] While it would have been preferable for all concerned to have had a clear purchase and sale agreement and a clear set of directions to pay given to the lawyer, I am not troubled by the lack of these documents. In a situation where money was tight and the transaction was occurring among family members, I can understand why such documents may not have been prepared.

[17] Based on all the foregoing, I find that the full $103,904 was consideration that Ms. Ashworth paid for the half interest in the home.

[18] Turning then to the credit cards, Ms. Ashworth takes the position that she also provided consideration by paying the outstanding balances of two credit cards. The cards were in her name, but Mr. Ashworth testified that he had been given secondary cards on the accounts. Both Ms. Ashworth and Mr. Ashworth testified that the balance on the cards was substantially made up of expenses that Mr. Ashworth had incurred on behalf of the company. Mr. Ashworth estimated such

expenses made up 90 per cent of the balances. No credit card statements were entered into evidence to support that position. This matter has been ongoing for many years. During that time, Ms. Ashworth would have been aware that the credit card balances were in issue and, thus, should have known that she should produce them at this hearing.

[19] While I found Mr. Ashworth and Ms. Ashworth to be credible, their estimate of what charges were on the cards is largely self-serving evidence. Given the financial position that the family was in at the time, it is not hard to imagine that both Ms. Ashworth and Mr. Ashworth would have been making a significant number of personal family purchases on credit cards. In the circumstances, without the credit card statements, I am not prepared to find that the payment of the credit cards was consideration for the transfer of the half interest in the home.

[20] Having reached that conclusion on the credit cards, there is no need for me to consider the effect of the $16,000 cash advance that was taken from another of Ms. Ashworth's credit cards to assist in paying down the credit cards.

[21] In conclusion, based on all the foregoing, the appeal is allowed and the matter referred back to the Minister of National Revenue for reassessment on the basis that the shortfall in consideration on the transfer was only $6,730, being the $204,500 fair market value of the half interest in the property, less the $93,865 mortgage that Ms. Ashworth assumed, less the $103,904 payment that Ms. Ashworth made against the line of credit at the direction of Mr. Ashworth.

Signed at Ottawa, Canada, this 19th day of April 2018.

"David E. Graham"

Graham J.

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APPEARANCES:

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