

the circumstances have not changed. At the time of that order, she says, Charles was living with his present wife out of wedlock and their son had been born and was living with them. Charles acknowledges that this was true, but states that before the marriage, his present wife was receiving public assistance in the amount of \$120.00 every two weeks. With the marriage, public welfare payments terminated.

Parents have the duty to support their minor children and the duty falls upon each parent in accordance with his or her ability to pay. *Costello v. LeNoir*, 462 Pa. 36, 337 A.2d 866 (1975). No support order is final so orders may be modified upon proof of a change in circumstances of a party, including financial circumstances. *Commonwealth ex rel. Levy v. Levy*, 240 Pa. Super 168, 361 A.2d 781 (1976). Assumption of new support obligations to a second wife and child by a second marriage constitute changes in circumstances sufficient to warrant a reduction in a support order for a child of a prior marriage. *Commonwealth ex rel. Gerstemeir v. Gerstemeier*, 196 Pa. Super 308, 175 A.2d 105 (1961); *Commonwealth ex rel. Piffath v. Piffath*, 63 Del. Co. 218 (1976).

In seeking modification of a support order, the burden is on the asking party to establish the required changed circumstances. *Gerstemeier*, supra. On July 6, 1977, Charles was paying \$20.00 per week towards the support of his illegitimate child and his paramour was receiving \$60.00 per week from Public Assistance. He was living with them.

At this time he is married to the mother of the child, has formally acknowledged the child as his own, his second wife is no longer receiving assistance, his support of the child is no longer fixed by the \$20.00 per week order, and his income has increased to \$225.00 per week. All of these are changed circumstances.

A common sense evaluation of these changes reveals a substantial reduction in Charles' ability to pay the existing order of \$58.50. His physical living arrangements have not changed since the order was made in July, 1977, but his status has changed. He is now totally responsible for the support of his second wife and the child. Before his marriage he was not required to support his present wife and his total obligation to support the child was measured in terms of the \$20.00 order.

The order of July 6, 1977, was not, as we said, a final order. It was temporary. Having found that there are changed circumstances we believe the correct approach is to review the entire matter in light of the present circumstances without

reference to any prior order. Orders for support must be based on existing circumstances. *Commonwealth ex rel. Milne v. Milne*, 150 Pa. Super 606, 26 A.2d 207 (1942); *Commonwealth v. Elliott*, 155 Pa. Super 477, 38 A.2d 531 (1944). So the amended order will not be an adjustment of the old order taking into consideration the changed circumstances, but will be a new temporary order based upon the circumstances as they exist at this time.

We will file, contemporaneously herewith an order in the usual form requiring Charles to pay \$33.00 per week for the support of his daughter, Jacquie. After we reached this conclusion we were somewhat surprised to find that mathematically it works out to be a fair distribution of the money available to these families. Sally's income is approximately \$95.00 per week; to that we add \$33.00 that Charles will pay her under our order giving her a total spendable income of \$128.00. From that she must support herself and her daughter. Thus, she has \$64.00 a week available for each of them.

Charles' income is \$225.00. From that we deduct \$33.00 which he must pay to Sally for Jacquie leaving him 192.00. From this he must support three persons, and has \$64.00 available for each.

The order of July 6, 1977, contained some provisions with regard to the payment of arrearages. That issue was not raised before us. We will continue the provisions of the former order relating to payment of the arrearage in effect.

CROW v. CROW, C.P., Franklin County Branch, E.D. Vol. 7, Page 147

Equity - Power of Attorney - Constructive Trust - Unjust Enrichment - Illegality of Purpose - Offer to Partition

1. A constructive trust is established when one spouse, pursuant to a power of attorney granted by the other spouse, conveys jointly owned property to herself, with the knowledge that the other spouse did not intend to surrender his beneficial interest in the property; to allow the first spouse to retain full ownership would result in her unjust enrichment.
2. Where no actual fraud is worked on a third party a constructive trust will not be prevented on the grounds of illegality of purpose.
3. An offer to partition real estate does not arise where one party refuses to reconvey formerly held joint property on the mistaken belief that the property is in her name alone.

Robert C. Schollaert, Esquire, Attorney for Plaintiff

George E. Wenger, Jr., Esquire, Attorney for Defendant

OPINION AND ORDER

Eppinger, P.J., July 24, 1978:

Clarence and Irene Crow are husband and wife. While he was on overseas assignment, Irene conveyed the property which they owned jointly to herself, using a power of attorney he had given her. Clarence asked her to reconvey his interest to him, she refused, and he brought this two-count action asking the court to find that Irene holds title to the real estate as a trustee for Clarence and order that she reconvey the property to joint ownership. In the second count, the court is urged to find that Irene's conveyance of the property to her name alone and refusal to reconvey it and excluding Clarence from possession of the property amounts to an offer to partition the property. The court is asked to appoint a trustee to sell the property and divide the net proceeds of the sale between them.

The case was tried and from evidence the court makes the following:

FINDINGS OF FACT

1. Clarence H. Crow and Irene K. Crow, also known as Irmgard K. Crow, are husband and wife.

2. On January 1, 1967, the parties purchased the tract of land with improvements that is the subject of this dispute. The purchase was made from joint funds. The property was titled in both their names.

3. On or about September 1, 1967, Clarence gave Irene a general power of attorney and under this power of attorney she had authority to convey Clarence's interest in real estate.

4. Prior to February 23, 1973, Clarence was concerned that his interest in the real estate could be attached because he was delinquent in payment of a North Carolina Support Order.

5. The parties discussed the possibility of transferring the property to Irene's name to avoid such attachment.

6. On January 27, 1973, Clarence told Irene in a letter to see an attorney to find out what had to be done to put the property in her name alone.

7. Later Irene called Clarence in Korea to tell him that she had spoken to an attorney and found out what was required. She was told by Clarence to do whatever she had to do to transfer the real estate to her own name.

8. In authorizing this transfer of the property to Irene, it was Clarence's intention, a fact well-known to Irene, to avoid the possibility of a North Carolina Court placing a lien on the property because of a support arrearage.

9. In authorizing the transfer, Clarence did not intend to part with his interest in the property.

10. When Clarence requested the reconveyance of the property, Irene refused to do so.

DISCUSSION

CONSTRUCTIVE TRUST

The facts clearly show that the motivation for making this transfer was to avoid a lien on the property arising out of Clarence's delinquency in a support payment. What we are asked to do by Clarence is impose a constructive trust upon the property to protect Clarence's interest.

A constructive trust arises, "[W]here a person holding title to property is subject to an equitable duty to convey it to another on the ground that (she) would be unjustly enriched if (she) were permitted to retain it." Restatement of Restitution, Sect. 160 (1977), *Chambers v. Chambers*, 406 Pa. 50, 176 A.2d 673 (1962). Clarence relied upon his wife to hold the property for them jointly and never intended to surrender his beneficial interest. Thus we believe Irene would be unjustly enriched should she be permitted to retain the property.

But what about Clarence's motive? Irene does not seriously dispute the facts, but believes that because Clarence intended to prevent a lien from being placed on the property, his purpose in authorizing the conveyance was illegal. She says therefore that the court should not acknowledge a constructive trust.

ILLEGALITY OF PURPOSE

Generally, an equity court will not impose a constructive trust to aid one in regaining his property where he has transferred it to a putative trustee for the purpose of defrauding

Franklin County Association For Retarded Citizens v. Lincoln Intermediate Unit No. 12 <i>Equity - Public School Intermediate Unit - Commonwealth Court Jurisdiction Act of 1970, P.L. 673, No. 233, 17 P.S. 211.101 et seq.</i>	18
Giant Food Stores, Inc., et al., John, et ux, v.	40
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In Re: Campion Estate <i>Orphans' Court - Testator's Direction of Tax Allocation - Conflict of Laws</i>	13
John, et ux. v. Giant Food Stores, Inc., et al. <i>Trespass Action - Petition to Open Default Judgment - Relief Within Sound Discretion of Court - Requirements for Relief - Distinction between Trespass and Assumpsit Actions - Timeliness of Filing - Reasonable Excuse for Failure to Appear before Default in the Action</i>	40
Jones v. Smith <i>Trespass - Assumpsit - Laches - Pa. R.C.P. 1030</i>	52
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Lincoln Intermediate Unit No. 12, Franklin County Association for Retarded Citizens v.	18
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creditors. *Policarpo v. Policarpo*, 410 Pa. 543, 189 A.2d 171 (1963). However, the mere intention to defraud is not, of itself, enough to bar relief. Rather the settlor is barred only if his improper motives resulted in an actual fraud on a creditor. *Chambers v. Chambers*, supra.

In this case, Clarence believed that it was necessary to transfer the property to avoid the possibility of the lien on his share. But entireties property is not subject to the private debts of either party. *Lithgow v. Taylor*, 16 D & C 390 (1931). The support order obligation was a private debt and so the property was protected from the North Carolina lien whether held by Clarence and Irene as husband and wife and thus as tenants by the entireties or by Irene alone. It follows that Clarence worked no actual fraud on a third party and thus cannot be prevented from having a constructive trust on the grounds of illegality of purpose.

On the other hand, to allow Irene to retain full ownership of the property would result as we have said in her unjust enrichment at Clarence's expense. A constructive trust in favor of Clarence with an order directing Irene to reconvey the property to them as tenants by the entireties is the appropriate remedy.

GIFT

At the argument Irene's attorney spoke in terms of a gift; that Clarence had made a gift to Irene. That was not claimed in the pleadings.

It is true that a gift is presumed in a transfer without consideration from a husband to a wife, *Lapoyower v. Lincoln College Preparatory School*, 376 Pa. 167, 125 A.2d 451 (1956). But our Supreme Court has explicitly held that a general power of attorney to sell or convey land cannot be used to effectuate a gift, *Baldwin v. Loesel*, 333 Pa. 26, 3 A.2d 389 (1939).

OFFER TO PARTITION

In Count II of Clarence's complaint we are asked to find that Irene's refusal to reconvey the property to him and to permit him to use it constitutes her offer to partition the property and the filing of this suit is his acceptance. We do not agree with this proposition. The evidence did not show that he was wrongfully excluded from the premises. Further Irene's refusal to reconvey the property was based on her mistaken belief that she rightfully held the property in her name

alone. The fact that she was mistaken in this belief cannot operate, we believe, to transform her actions into an offer to partition the real estate.

REIMBURSEMENT OF IRENE'S EXPENSES

At the argument, Irene's attorney asked the court to require Clarence to reimburse Irene for half of the property maintenance costs incurred since Clarence stopped contributing to such expenses. The issue was not brought before us except at the time of argument. No evidence was presented that would permit the court to calculate the sum to which Irene might be entitled. In addition, we do not know whether the money Irene spent was her own or funds which Clarence provided.

CONCLUSIONS OF LAW

1. The parties, Clarence H. Crow and Irene K. Crow, husband and wife, owned the real estate in question in these proceedings as Tenants by the Entireties prior to the time the wife using a general power of attorney conveyed the premises placing the record title in her name alone.

2. The conveyance was made pursuant to authority given to the wife by the husband.

3. It was the intent of the parties at the time of the conveyance that the conveyance would serve to prevent a lien from being placed on the property as a result of the husband's being delinquent on a North Carolina Support Order.

4. At the time of the conveyance, the husband did not intend to surrender his beneficial interest in the property.

5. Whether the property had been conveyed to the wife or not, it was immune from the lien sought to be avoided.

6. To allow the wife to retain full ownership of the property would result in her unjust enrichment.

7. The wife holds the property subject to a constructive trust for the benefit of the husband's interest in the property.

8. The husband is not barred from the relief of a constructive trust by his improper motive since he worked no actual fraud on any party.

9. The wife will be required to reconvey the property to the husband and wife as tenants by the entireties.

10. The wife's actions in refusing to reconvey the property prior to the institution of this suit did not constitute an offer to partition the real estate.

11. The husband is not liable for half of the maintenance expenses incurred by the wife during the time the wife alone paid such expenses.

ORDER OF COURT

NOW, July 24, 1978, IT IS ORDERED that Irene K. Crow, also known as Irmgard K. Crow, holds the property described in paragraphs 6 and 7 of the complaint in these proceedings in a constructive trust for her husband, Clarence H. Crow and herself as tenants by the entireties, and

IT IS THEREFORE FURTHER ORDERED that she reconvey the property to her husband and herself as tenants by the entireties.

Clarence H. Crow's prayer, that Irene's refusal to reconvey to property amounts to an offer to partition, is denied.

The parties shall each pay their own costs.

COMMONWEALTH v. GALLAGHER, C.P. Cr. D. Fulton County Branch, No. 101 of 1973

Criminal Law - Operating Motor Vehicle While Under Influence of Intoxicating Liquor - Post Trial Motions - Sufficiency of Evidence - Circumstantial Evidence - Relevancy of Ownership of Vehicle - Cautionary Instructions - Imposition of New Suspended Sentence When No Supersedeas Involved in Earlier Appeal

1. The Commonwealth's burden of proof in a criminal case may be met by circumstantial evidence alone.

2. Upon a post trial motion in arrest of judgment, the evidence must be considered in the light most favorable to the Commonwealth.

3. To warrant a conviction on circumstantial evidence the facts and circumstances established by such evidence must be of such a character as to produce a moral certainty beyond a reasonable doubt, but need not be absolutely incompatible with innocence.

4. In a case in which the defendant's vehicle was found in the early morning hours parked in an awkward and dangerous position in a