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COMMUNITY PROPERTY AGREEMENTS — MANY QUESTIONS, FEW ANSWERS

ROBERT F. BRACHTENBACH*

The statute which creates the husband-wife contract commonly referred to as the community property agreement was first enacted by the Territorial Legislature of 1879.¹ Today's statute is RCW 26.16.120.²

A 1950 Law Review Comment³ made a comprehensive analysis of many of the issues raised by the community property agreement. Reference is made to the Comment for background material. This article has a dual purpose: first, to inquire further into some of the issues discussed in the 1950 Comment with particular and detailed attention to creditors' problems, and second, to examine today's practice as to the use of these agreements, looking specifically at their efficacy in the passage of real property titles, motor vehicle transfers and stock transfers. At the outset a brief summary of the statute and some of the cases will be made for orientation purposes.

The agreement has been judicially described as two-fold in nature, contractual and testamentary,⁴ as not being a will⁵ and as a conveyance by the decedent to the surviving spouse.⁶ It is recognized as *sui generis*.⁷

The statutory⁸ requirements for such an agreement are: (1) it must be between husband and wife, (2) in writing, (3) concerning the whole or any portion of community property, (4) then owned or thereafter

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¹ Laws of 1879, p. 77.

² "Nothing contained in any of the provisions of this chapter or in any law of this state, shall prevent the husband and wife from jointly entering into any agreement concerning the status or disposition of the whole or any portion of the community property, then owned by them or afterwards to be acquired, to take effect upon the death of either. But such agreement may be made at any time by the husband and wife by the execution of an instrument in writing under their hands and seals, and to be witnessed, acknowledged and certified in the same manner as deeds to real estate are required to be, under the laws of the state, and the same may at any time thereafter be altered or amended in the same manner: *Provided, however,* That such agreement shall not derogate from the right of creditors, nor be construed to curtail the powers of the superior court to set aside or cancel such agreement for fraud or under some other recognized head of equity jurisdiction, at the suit of either party."

³ Comment, 25 Wash. L. Rev. 165 (1950).

⁴ *Bartlett v. Bartlett*, 183 Wash. 278, 48 P.2d 560 (1935).

⁵ *McKnight v. McDonald*, 34 Wash. 98, 74 Pac. 1060 (1904).

⁶ *In re Wittman's Estate*, 58 Wn.2d 841, 365 P.2d 17 (1961).

⁷ *Reagh v. Dickey*, 183 Wash. 564, 48 P.2d 941 (1935).

⁸ RCW 26.16.120.

acquired, (5) under the hands and seals of the parties, (6) to be witnessed, acknowledged and certified in the same manner as deeds.

The agreement is not revoked by the subsequent insanity of one spouse⁹ nor will it be revoked by the subsequent will of one spouse.¹⁰ By the language of the statute it can be altered or amended in the same manner as created, that is, by written agreement of both spouses. Accordingly, both parties must be competent and both must consent to any alteration or revocation. In the event of the incompetency of one spouse, the agreement therefore cannot be revoked. This obviously prevents the competent spouse from circumventing the incompetent's guardianship estate by devising his or her share elsewhere.

While the statute refers only to altering or amending the agreement, there should be little doubt that the court would hold that the parties have the freedom of contract to revoke the agreement by an instrument of the same formality as the original agreement.

It is uncertain whether subsequent acts or instruments short of an actual instrument of revocation will serve to revoke the agreement, even though those acts or instruments are inconsistent with the ultimate effect of the community property agreement. In a 1961 case,¹¹ subsequent, inconsistent acts and acts of alleged repudiation were urged as grounds for revocation. Primarily because these acts were unilateral and because there was no evidence of acquiescence, nor evidence of reliance upon the unilateral acts of repudiation, the court held that there had been no revocation. However, the court seemed to reject the entire principle of subsequent repudiation, short of actual revocation by instrument, by the following language:

Even if mutual repudiation may, under certain circumstances not here present, constitute a rescission, we are not prepared to subject the statutory community property agreement, which serves as a recorded conveyance of property to the surviving spouse, to the cloud of uncertainty such a rule would cast upon the record and, hence, the title to the property.¹²

⁹ *In re Brown's Estate*, 29 Wn.2d 20, 185 P.2d 125 (1947).

¹⁰ *Ibid.*

¹¹ *In re Wittman's Estate*, 58 Wn.2d 841, 365 P.2d 17 (1961).

¹² *In re Wittman's Estate*, *supra* n. 11 at 845, 365 P.2d at 20. *Quaere* whether this rationale is valid or desirable if the community property agreement has not been recorded, for neither the execution nor the revocation of such an agreement then would subject the record to a "cloud of uncertainty." Under the analysis of the court, of Mr. and Mrs. Wittman had executed a formal instrument of revocation, would the same have had to be recorded in order to be effective and to remove the "cloud of uncertainty?"

PROBLEMS OF CREDITORS

Turning to the matter of creditor's rights, we encounter a vast array of unanswered issues and conflicting theories; we must conclude that the statute has failed completely in this area. The statute, in naive simplicity, states: "Provided, however, That such agreement shall not derogate from the right of creditors"¹³ Unfortunately, the statute does not define what rights the creditors have, nor does it provide any procedure for the creditor to enforce those rights. Therefore, it is necessary to draw some analogies of the rights of creditors before and after death, apart from the statute here in question. Presumably these must be the rights which are preserved by the statute.

Prior to the debtor-spouse's death, the problems that may arise are traceable to the *Volz v. Zang*¹⁴ type of agreement. That case established that a properly drafted agreement can convert the separate property of one of the spouses to community property of the marital community. The rationale of the case indicates that the conversion is effective immediately upon the execution of the agreement. The court said: "Here, by the voluntary act of the parties, their separate property was conveyed to the community." (Emphasis added.)¹⁵

Assuming that there is a conversion of separate property into community property, what is the effect, if any, upon the creditors of the spouses or of the community? There is no statutory requirement that the agreement be recorded to accomplish the fact of conversion. Whether the court would impose such a requirement to protect creditors and innocent purchasers is not clearly predictable. Consider the case of a prospective purchaser¹⁶ of real estate whose title search

¹³ RCW 26.16.120.

¹⁴ 113 Wash. 378, 194 Pac. 409 (1920).

¹⁵ *Volz v. Zang*, 113 Wash. 378, 382, 194 Pac. 409, 410 (1920). It should be noted that this immediate conversion principle was not necessary to the court's decision. The same result would have obtained had the court held the conversion to be effective only upon the death of the spouse. This construction would have complied literally with the statutory language "... to take effect upon the death of either."

¹⁶ The non-use of the words "bona fide purchaser" was intentional in view of RCW 26.16.095 which provides that an "actual bona fide purchaser" who relies on the record showing legal title in only one person, is protected from outside claims to the property. The Washington court has construed "actual bona fide purchaser" as "... such persons as purchase without knowledge of the existence of the marriage relation, or who could not, with reasonable diligence, have obtained such knowledge." *Dane v. Daniel*, 23 Wash. 379, 392, 63 Pac. 268, 272 (1900). This means, in turn, that one is not entitled to the status of a bona fide purchaser if the spouses have maintained the marital relation within this state, even though they may be living separate and apart at the time of the transaction in question. *Campbell v. Sandy*, 190 Wash. 528, 69 P.2d 808 (1937); *Dane v. Daniel*, *supra*; *Adams v. Black*, 6 Wash. 528, 33 Pac. 1074 (1893). The same rule has been applied to encumbrancers as well as purchasers, and protection is afforded only if the spouses never have maintained the marital relationship in this state, or at least have not done so for a considerable period of time.

reveals that the property, at least of record, is the separate property of the husband. The spouses, however, have previously executed an agreement converting all separate property into community property; this agreement has not been recorded. Assuming there is no question of bad faith, estoppel, ratification or acquiescence binding the wife, can the wife attack a conveyance by the husband to the purchaser on the basis that she did not joint in the conveyance of community realty?¹⁷ Is the grantee a "creditor" within the meaning of the statute, and if so, does he have a right to rely upon the record?

The agreement leads to problems for creditors other than those concerning recordation. A separate creditor of either spouse can enforce his claim only against the separate property of that spouse.¹⁸ If a creditor has specific priority as to an asset, such as a judgment lien on separate real estate, the conversion from separate property to community under a *Volz v. Zang* type agreement should not destroy the lien. The creditor had this right prior to the agreement and to hold it destroyed would be a derogation by the agreement. However, would a judgment against one spouse separately be a lien on real estate inherited after execution of the agreement converting separate property then owned, or thereafter acquired, into community property? Apart from the agreement, the lien would attach to the separate property acquired by inheritance.¹⁹ *Volz v. Zang*²⁰ appears to hold that the conversion aspect of the agreement is effective immediately and automatically; under this analysis the property would be community and the separate lien would not attach. Could the creditor argue successfully that the realty must have been separate property for an instant²¹ since it went to the one spouse, and only then became community property by the terms of the agreement?

In fact, a more basic argument is that the protection of creditors'

Magee v. Riskey, 82 Wash. 178, 143 Pac. 1088 (1914); Daly v. Rissutto, 59 Wash. 62, 109 Pac. 276 (1910); Canadian & American Mortgage & Trust Co. v. Bloomer, 14 Wash. 491, 45 Pac. 34 (1896); Schwabacher Bros. & Co. v. VanReypen, 6 Wash. 154, 32 Pac. 1061 (1893); Nuhn v. Miller, 5 Wash. 405, 31 Pac. 1031 (1892); Sadler v. Niesz, 5 Wash. 182, 31 Pac. 630, 1030 (1892).

¹⁷ RCW 26.16.040.

¹⁸ See, e.g., Achilles v. Hoopes, 40 Wn.2d 664, 245 P.2d 1005 (1952); Smyser v. Smyser, 17 Wn.2d 301, 135 P.2d 455 (1943); Curtis v. Hickenbottom, 158 Wash. 198, 290 Pac. 822 (1930).

¹⁹ RCW 4.56.190.

²⁰ 113 Wash. 378, 194 Pac. 409 (1920).

²¹ Since the judgment lien attaches automatically, this would be sufficient. Note that since the lien would attach in the absence of the agreement, a holding that the inherited property is not subject to the lien would derogate from this prospective right of the creditor. Is such a "right" within the protection afforded by the statute?

rights refers only to the "passage" at the time of death and has no effect upon the conversion feature. In other words, the status agreement is merely incidental to the survivorship agreement and the language regarding creditors refers only to the "transfer" at death. It is impossible to predict the outcome of this argument.

The agreement may work to the advantage of the creditor. Consider a creditor who has a judgment against the husband individually and against the marital community. If the spouses execute an agreement converting all separate property into community, the wife's separate realty now becomes community property. Since the judgment lien attaches to after-acquired community real estate,²² the creditor appears to have a windfall.

Rights of the creditors as to personal property of the spouses or the community should not present these problems since the specific priority as to any particular personal property does not arise until there is a levy.²³ As the specific rights of the creditor are not fixed until this levy, a subsequent conversion-type community property agreement should not affect these rights, and a prior agreement will have determined the status of the property prior to the accrual of such rights.

Upon the death of a spouse the rights of the creditor will depend upon the nature of his claim and the nature of the asset against which he seeks to enforce that claim. If he has a specific claim against particular property, as by a lien or mortgage, enforcement, at least as to that property, will not be hindered by the fact of death, other than by the statute of limitations. The statute of limitations on real property is six years from the date of death.²⁴ There is no specific limitation as to personal property, and since RCW 4.16.200²⁵ tolls the statute until one year after issuance of letters to the personal representative, the creditor should never be barred by this defense, absent administration.²⁶

Assuming that claimant is a general creditor, what rights are pre-

²² RCW 4.56.190.

²³ RCW 6.04.100 (5).

²⁴ RCW 11.04.270. "No real estate of a deceased person shall be liable for his debts unless letters testamentary or of administration be granted within six years from the date of the death of such decedent: *Provided, however,* That this section shall not affect the lien of any mortgage, upon specific real property, existing and recorded as required by law at the date of the death of such decedent."

²⁵ ". . . If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof and the cause of action survives, an action may be commenced against his representatives after the expiration of that time and within one year after the issuing of letters testamentary or of administration."

²⁶ *Gleason v. Hawkins*, 32 Wash. 464, 73 Pac. 533 (1903) (claim not presented until probate commenced twenty years after the death.)

served by the statute? What is his mode of enforcement? The statute does not create any new rights for the creditors; it merely preserves whatever rights the creditors may have had upon death of the debtor. The creditor should have no fewer rights than he would have under the various statutes of descent, which provide that the property passes to the heirs subject to debts.²⁷

Enforcement of the claim by an action directly against the heir (the surviving spouse under the agreement) has been recognized.²⁸ However, the probate code²⁹ specifically grants to one or more of the principal creditors the right to be appointed administrator if the decedent was intestate or if the named executor refuses to act (which would necessarily be the case if no probate were commenced). Does this provide the creditor an exclusive method of enforcement so that the surviving spouse could defend successfully a direct action on the basis that the creditor must pursue his statutory right to be administrator? On the other hand, if the creditor applies for appointment, can the surviving spouse successfully defend on the theory that there is nothing subject to the jurisdiction of the probate court since all property passes via the agreement?

If the surviving spouse has conveyed the property to a bona fide purchaser before the creditor attempts realization against that property, how should the creditor proceed? In analogous situations (absent community property agreement complexities), the numerical majority of the cases in other jurisdictions holds the property to be free of the creditor's claim, but imposes liability upon the heir.³⁰ There is limited

²⁷ RCW 11.04.020: "When any person shall die seized of any lands, tenements or hereditaments, or any right thereto, . . . as his separate estate, not having devised the same, they shall descend subject to the debts. . . ." RCW 11.04.030 (2): "The personal estate remaining after such allowance, shall be applied to the payment of the debts of the deceased, . . ." RCW 11.04.050: "Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to testamentary disposition of the deceased husband or wife, subject also to the community debts. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, [it descends to certain heirs] . . . subject to the community debts. . . ." RCW 11.04.250: "When a person dies seized of lands, tenements or hereditaments, or any right thereto . . . his title shall vest immediately in his heirs or devisees, subject to his debts . . ."

²⁸ "The general rule under statute is that an heir or distributee is liable for the debts of his ancestor to the extent of, and with respect to, property of his ancestor descended or distributed to him, where creditors are not barred by failure duly to present their claims in administration proceedings or by lapse of time." 16 Am. Jur. *Descent and Distribution* § 118 (1938). Also see 16 Am. Jur. *Descent and Distribution* §§ 129-134 (1938).

²⁹ RCW 11.28.120 (4); RCW 11.28.010.

³⁰ See cases collected in Annot., *Liability for debts of decedent's estate of property which has passed out of hands of beneficiary of estate in whose hands it was liable*, 103 A.L.R. 1004 (1936).

authority that imposes continued liability against the property, even in the hands of a bona fide purchaser.³¹ There is no Washington case directly in point.

Needless to say, the foregoing illustrates that the statute provides something less than a satisfactory method of dealing with creditors' rights.

EFFECT OF AGREEMENT ON WILLS

The legal interrelation of wills and community property agreements is perplexing and without answer in the main. Assuming that a community property agreement is first executed, followed by the inconsistent will of one spouse, it is established that the will does not revoke the agreement.³² Execution of the agreement, followed by inconsistent wills of both spouses, such wills not having been executed in reliance upon the inconsistent will of the other spouse, apparently does not revoke the agreement.³³ The *Wittman Estate* case³⁴ seems to say that no subsequent act amounting to repudiation will act as a revocation. This lends certainty to the rule, but more often than not may well thwart the intention of the parties.

In some counties it is common practice to execute community property agreements and mutual wills simultaneously without recording the agreement prior to death. The theory is that if use of the agreement, after death of a spouse, will not be desirable for any reason, the will can be probated and the agreement ignored. Certainly this practice raises some problems. The agreement is effective immediately upon death so that title passes to the survivor at that instant. If all assets come within the ambit of the agreement, there is in fact no property subject to administration. While it can be argued that the surviving spouse has a right to waive the benefit of the agreement and can elect to probate, there is an element of doubt if a full disclosure is made to the probate court. If the agreement is used, and the will ignored, there is a possible violation of the statute requiring presentation of a will within a specified time after death.³⁵

³¹ *Thomas v. Williams*, 80 Kan. 632, 103 Pac. 772 (1909); *Wyman v. Brigden*, 4 Mass. 150 (1808); *Flood v. Strong*, 108 Mich. 561, 66 N.W. 473 (1896).

³² *In re Brown's Estate*, 29 Wn.2d 20, 185 P.2d 125 (1947).

³³ *In re Wittman's Estate*, 58 Wn.2d 841, 365 P.2d 17 (1961).

³⁴ 58 Wn.2d 841, 365 P.2d 17 (1961).

³⁵ RCW 11.20.010. "Any person having the custody or control of any will shall, within thirty days after he shall have received knowledge of the death of the testator or testatrix, deliver said will to the superior court having jurisdiction, or to the person named in the will as executor or executrix; and any executor or executrix having in

FEDERAL AND STATE TAX ASPECTS

Tax ramifications probably are ignored more often than considered. Use of the agreement may save probate costs, but can add a substantial income tax burden in a particular case. Since title to the property passes immediately upon death to the surviving spouse, all income from the property is reportable by the surviving spouse. This destroys possible use of the estate as a separate tax paying entity which would be available if an estate existed.³⁶

Relative to state death taxes, RCW 83.24 specifically authorizes the determination of inheritance tax without probate. The amount of the tax, however, is not the same, for the Inheritance Tax Division of the Washington State Tax Commission takes the position³⁷ that no deduction can be allowed for debts of the decedent since there is no court or executor qualified to allow them as required by statute.³⁸ As a matter of policy, a reasonable allowance can be made for funeral expenses, expenses of last illness and legal expenses in connection with tax clearance.³⁹ While the statute has been amended⁴⁰ since it was

his custody or control any will shall within forty days after he received knowledge of the death of the testator or testatrix either present the same for probate to the court having jurisdiction, or present the same to such court with his written refusal to serve as such executor or executrix; any person who shall wilfully violate any of the provisions of this section with intent to injure or defraud any person shall be deemed guilty of a gross misdemeanor, and any person who shall without reasonable excuse violate any of the provisions of this section shall be liable to any person interested in the will for damages caused by such neglect." *Quaere* whether the non-delivery of the will can be excused by an argument that since the agreement takes precedence, the will is of no effect. Should the custodian rely on this argument without satisfying himself as to the validity of the agreement?

³⁶ INT. REV. CODE OF 1954, § 641.

³⁷ In the pamphlet published by the State Tax Commission (undated) entitled, Guide to Inheritance Tax Reporting, p. 27, the following appears: "There is no provision in the 'no-probate' procedure for allowance of decedent's debts as deductions. However, as a matter of Tax Commission policy, a reasonable allowance can be made for funeral expenses, expenses of last illness, and legal expenses in connection with the tax clearance." On the back of the official "no-probate" return form it is stated that "Deductions may be requested for reasonable funeral expenses, expenses of last illness unpaid at date of death, attorneys' fees incident to the tax clearance, real estate taxes due and payable at the date of death, mortgages and liens. No deduction will be allowed for debts of the decedent, since there is no court or executor qualified to allow them as required by RCW 83.04.013."

³⁸ RCW 83.04.013. "All debts owing by the decedent at the time of his death, the local and state taxes due from the estate prior to his death, and a reasonable sum for funeral expenses, monument or crypt, court costs, including cost of appraisal made for the purpose of assessing the inheritance tax, the fees of executors, administrators or trustees, reasonable attorney's fees, and family allowance not to exceed one thousand dollars, and no other sum, shall be allowable as deductions from the gross value of the entire property, but said debts shall not be deducted unless the same are allowed or established within the time provided by law."

³⁹ See *supra*, note 38.

⁴⁰ The statute was amended to its present form by Wash. Sess. Laws 1961, c. 292 § 3, and now provides as follows: "All debts owing by the decedent at the time of his death, the local and state taxes due from the estate prior to his death, and a reasonable

construed in *In re Lambrecht's Estate*,⁴¹ the part of the statute which provides ". . . but said debts shall not be deducted unless the same are allowed or established within the time provided by law" might be held to allow a deduction despite the position taken by the Inheritance Tax Division. By a judgment against the surviving spouse, based upon community liability, it could be held that the debt had been "established" within the time allowed by law.

If the estate may be taxable, the Tax Commission may have one of its appraisers fix the values.⁴² Contrast this situation to the usual estate appraisal where the estate nominates two appraisers and the Tax Commission only one.⁴³ In many cases the practical effort of the opinion of two appraisers, particularly if they are qualified, will outweigh the higher valuation of the Tax Commission nominee. This potential advantage is lost under the no-probate determination with the single appraiser chosen by the Commission. Under the statute, however, the surviving spouse can have a judicial review of the Commission's determination.⁴⁴

PRACTICAL USE OF THE COMMUNITY PROPERTY AGREEMENT

We now turn to the matter of the efficacy of the agreement as to specific types of assets.

Motor vehicles. Regarding the transfer of title to motor vehicles, the Department of Licenses has a section in its manual⁴⁵ outlining

sum for funeral expenses, monument or crypt, court costs, including cost of appraisal made for the purpose of assessing the inheritance tax, the fees of executors, administrators or trustees, reasonable attorney's fees, and family allowance not to exceed one thousand dollars, and no other sum, shall be allowable as deductions from the gross value of the entire property, but said debts shall not be deducted unless the same are allowed or established within the time provided by law." The prior statute contained the following language immediately after the last sentence quoted above: ". . . unless otherwise ordered by the judge or court of the proper county . . ." It was this language that was deleted by the 1961 amendment.

⁴¹ 112 Wash. 645, 192 Pac. 1018 (1920). This case held that under the prior statute the deduction for debts was allowed notwithstanding that there had been no probate. The rationale was that the prior language, ". . . unless otherwise ordered by the judge or court of the proper county, . . ." showed ". . . that a formal administration of a decedent's estate by probate proceedings in the superior court and the establishment of claims through such proceedings is not necessary to the settlement of the inheritance tax which may be due from such estate." *In re Lambrecht's Estate*, 112 Wash. 645, 649, 192 Pac. 1018, 1020 (1920).

⁴² RCW 83.24.010. ". . . after such investigation as is necessary to determine the fair market value of all of the property becoming subject to the inheritance tax laws, the tax commission through its inheritance tax division shall determine the amount of inheritance tax due, if any." Also see the State Tax Commission pamphlet, *op. cit. supra* note 38, at 27.

⁴³ RCW 83.16.040; RCW 11.44.010.

⁴⁴ RCW 83.24.020.

⁴⁵ This pamphlet is entitled: Proceedings Necessary to Transfer Title from Deceased Person, Divorce & Desertion. It is available upon request.

procedures to be followed to transfer title from a decedent. A copy of the agreement is to be attached to the certificate of title, together with a copy of the death certificate. With these documents the Department will transfer title to the surviving spouse, or to a third person if the survivor is selling the vehicle.

In many instances, the agreement will serve as a relatively inexpensive and fast method of vesting title to real property in the surviving spouse.

Real property. In many instances, the agreement will serve as a relatively inexpensive and fast method of vesting title to real property in the surviving spouse.

Formerly the title insurance companies charged an added premium to insure title within six years of death.⁴⁶ Under the rate schedule in effect since September 1, 1958, such additional charge is not made. This eliminated one of the major arguments against use of the agreement to transfer title to real property without probate cost. However, title companies have laid down certain requirements which appear fairly standard among the several companies. It will be necessary to prove to the satisfaction of the title company, usually by affidavit, that there are no unpaid creditor's claims against the decedent's estate. If a "no-probate" inheritance tax determination has not been made, proof of the value of the estate will have to be made to show a value well within the exemptions. If there is any question of value, a no-probate return should be submitted to the Inheritance Tax Division.

Usually clearance of title to real property will involve these steps: (1) record the agreement, if not already done; (2) make proof of death, either directly to the company or by recording the death certificate; (3) obtain a no-probate inheritance tax determination or prove that value is well within the exemptions; (4) submit proof, usually the survivor's affidavit, and sometimes receipts, of payment of debts, particularly funeral and last illness.

Proof of the community status of the real property will be necessary because the agreement is limited in its operation to community property⁴⁷ and therefore will not affect the title to separate property. Of course, it is possible for the agreement to convert separate property

⁴⁶ The premium was an additional 100% to insure title within two years of the death and an additional 50% if insurance was sought between two and six years after the death.

⁴⁷ RCW 26.16.120. ". . . concerning the status or disposition of the whole or any portion of the community property. . . ."

into community property, as discussed above,⁴⁸ and thus subject the former separate property to the statutory agreement. The conversion feature could be drafted so as to convert only specific separate property or it could be an omnibus conversion of all property then owned or thereafter acquired. Apparently, a mere declaration that all property, whether separate or not, now owned or hereafter acquired, shall be community property will be sufficient, even though words of conveyance are not present. In the *Volz* case,⁴⁹ operative words of conveyance were not present, but the agreement declared that it should operate as a "voluntary conveyance." Obviously, the parties should agree to such a conversion only with full realization that future acquisitions by gift or inheritance otherwise would be separate property of the receiving spouse with control thereover. If a substantial gift or inheritance were received by a spouse at a time of serious domestic difficulties, that spouse might well rue the agreement giving the now dissenting spouse rights in what would otherwise be separate property.

As discussed above, creditors of the decedent appear to have six years from the date of death to pursue the real property as a source of satisfaction of their claim.

If the creditor can pursue the property in the hands of a purchaser,⁵⁰ the title company has a potential liability to that purchaser and reliance upon the self-serving affidavit of the surviving spouse is hardly a satisfactory method of proving that such exposure does not exist. Apart from the final legal adjudication that might be made, a creditor could sue the purchaser, alleging his claim as a prior right to the property. Presumably the purchaser would tender the defense to the title company. Faced with the costs of defense in an area of legal uncertainty and problems of public relations, the title company may find settlement quite attractive regardless of the merits of the action.

Consider also the problems of the title company which accepts an affidavit that all *community* obligations and debts have been paid. Under the decision of *In re McHugh's Estate*,⁵¹ the decedent's portion of the community property becomes liable for his or her separate debts, and the title company might learn too late that the affidavit was in fact not true or at least misleading, and that the property was burdened with separate debt claims.⁵²

⁴⁸ *Supra*, notes 15 and 16, and accompanying text.

⁴⁹ *Volz v. Zang*, 113 Wash. 378, 194 Pac. 409 (1920).

⁵⁰ *Supra*, note 32, and accompanying text.

⁵¹ 165 Wash. 123, 4 P.2d 834 (1931).

⁵² This is, of course, based on the implicit assumption that this rule will apply in

Apart from the questions arising from separate property, the unanswered doubts about creditors' rights and possible increased tax burdens in some instances, it must be concluded that the agreement does offer a means of vesting title to real property in the surviving spouse with a minimum of delay and expense. Of course, the statistics indicating that creditors' problems seem to arise infrequently will be of little comfort to the victim of such creditors' claims.

Corporate Stock Transfers. Use of the agreement to transfer corporate stock will meet varying degrees of frustration. Transfer of stock in a Washington corporation, where there may be some familiarity with the community property agreement, is often relatively simple. For example, such a transfer has been accomplished by furnishing a certified copy of the death certificate, a photostat of the agreement and the usual indemnity agreement.⁵³

As would be expected, more difficulty will be encountered with the transfer agent in another state who probably never before heard of such an agreement. The following requirements in such cases are not unusual: (1) copy of the agreement certified by the county auditor; (2) certified copy of death certificate; (3) proof of marital status at time of execution and until time of death; (4) proof of residence of spouses in Washington at time of execution; (5) proof of community character of stock; (6) proof of continued existence of agreement; (7) absence of fraud or other ground as basis for setting aside; (8) legal age and mental competency of spouses at time of execution; (9) absence of unpaid obligations of decedent or community; (10) no-probate proceedings pending; (11) adequate and satisfactory indemnity furnished by survivor, consisting of an indemnity agreement and a surety bond.⁵⁴

Uninformed Use of the Agreements. It is the uninformed use of the agreement which causes greatest concern. Forms are obtained easily

the non-probate situation. There is no direct authority, but the rationale of the court, being based on the fact that death dissolves the community, in the opinion of the author, should be applicable generally.

⁵³ The author recently effected a transfer in this manner. The corporation did not request an indemnity bond, but did take an indemnity agreement from the surviving spouse. The procedure will vary with different corporations. The author is aware of a case wherein the King County Superior Court held that the widow could not force the particular corporation concerned to transfer to her shares of the corporation stock formerly held in the name of her deceased husband, since there was no method short of probate that would relieve the corporation of its concern relative to claims of creditors. Unfortunately, perhaps, the case was not appealed. *McDowell v. Seattle 1st Nat'l Bank*, No. 579503 (Sup. Ct., King Co., Wash., July 17, 1962).

⁵⁴ See a short article which appeared in *Washington State Bar News*, Sept.-Oct. 1961, p. 33.

from various sources. It is suspected that they are filled in by laymen who possess varying degrees of knowledge. Motivated by the belief that these agreements will save "all those probate costs," many persons execute the agreement with the help of laymen, but completely without regard to their particular assets and often in contradiction to their intended disposition of their estate. For example, the author is aware of a husband and wife, without children, executing such an agreement with the aid of a layman, but without the advice of counsel. After the husband's death, the title company would not insure title to certain real property since it appeared of record that it was the husband's separate property and the agreement used was not sufficient to convert it into community property. Under the statute,⁵⁵ one half of the property went to the husband's brothers and sisters and his nieces and nephews by right of representation. Another actual case involved a husband and wife who had executed carefully drawn wills. The dispositive plan of each will recognized and provided for the family of each spouse by an earlier marriage. Some years later, having been urged to sign a community property agreement to avoid probate costs, these same spouses executed such an agreement. Fortunately, despite the admonition of the layman-draftsman never to show the agreement to a lawyer, the parties subsequently did seek advice of counsel. When advised of the ultimate result of the community property agreement, they promptly revoked the agreement.

Such illustrations point up the danger of uninformed use of the agreements, but the very simplicity and informality with which the form agreement can be executed leads to the conclusion that there will be continued uninformed use.

CONCLUSION

In some areas at least, there has been a substantial increase in use of the community property agreement. For example, in Yakima County the number of recordings of these agreements soared from 35 in a six month period in 1951 to 240 in a six month period in 1962.⁵⁶ The vast majority of these agreements are recorded by the parties prior to the death of either spouse. During this same period the number of deaths in the county and the number of probates increased almost exactly in

⁵⁵ RCW 11.04.020 (2).

⁵⁶ Statistics taken from Daily Report of Recordings published by Title Guaranty Co., Yakima, Washington.

direct proportion to the population increase.⁵⁷ Since many of these agreements are recorded at the time of execution and prior to death, it is predicted that the number of probates will decline substantially in later years as deaths occur among those now executing agreements.

This increased use can be attributed to several causes. First, some labor unions have publicized to their members the supposed advantages of the agreement. Second, some lawyers found considerably more enthusiasm for the agreement when faced with joint tenancy under Initiative 208,⁵⁸ presumably on the theory that the agreement was the lesser of the two evils.

The foregoing indicates that there is widespread use of the agreement, despite the many unsolved problems. It is urged that the State Bar Association accept the responsibility of drafting and sponsoring legislation to cure the defects inherent in the statute, particularly in relation to creditors' rights.

⁵⁷ In 1951, 476 probates were filed with the Yakima County Superior Court Clerk and in 1961, 517 were filed, according to information furnished by that Clerk. Deaths numbered 1199 in 1951 and 1256 in 1961 according to statistics provided by the Yakima County Health Department. The population increase in the county from 1950 to 1960 was 6.9% according to the Research Council's Handbook, State and Local Government in Washington (1st Ed., 1961-1962).

⁵⁸ Wash. Sess. Laws 1961, ch.2; RCW 64.28.