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Establishment of Interest in Intestate Decedents' Estate

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so that in the future landowners can frame their sale arrangements in deliberate reliance on it, and as late as possible in the chain of value-affecting events, so that the unwary will not find themselves without redress or with only partial redress for an actual decline in value.

The Washington cases continue to leave open the question whether a cause of action accrues whenever there is a major change in the quality of user of the prescriptive easement, as by a change from propeller driven aircraft to jets or from jets to rockets or such mammoths as supersonic transports. As has been pointed out,[21] *Martin* opened the door to an affirmative answer in such cases. Since the court in the principal case did not abrogate any of its earlier pronouncements, the answer seems still to be an affirmative one. Although this may evoke *in terrorem* responses, the result is in keeping with the policy, integral to the result in the principal case, that the public pay for what it takes.

ESTABLISHMENT OF INTEREST IN INTESTATE DECEDENTS' ESTATE

Plaintiff, surviving member of a thirteen year meretricious relationship with defendant's decedent, brought an action to establish a half-interest in the estate, consisting of both real and personal property. She stated alternative theories of recovery—including resulting trust, partnership, joint venture, and a pooling agreement—all but the first being contractually based. Although most of the assets of the estate were accumulated during their cohabitation, plaintiff was unable to prove by "clear, cogent, and convincing" evidence the existence of any significant monetary investment from her personal funds. The evidence indicated that her contribution to the accumulated assets consisted primarily of labor, including assisting her partner, a masonry contractor, in building, finishing, and landscaping their home, and in some of his commercial ventures. The trial court, in denying recovery, found that no specific agreement existed, and that it was impossible to trace the funds used to purchase the property. On appeal, the Washington Supreme Court affirmed, over vigorous dissents, in a 5-4 decision. *Held:* When title to property acquired during a meretricious relationship is held by a decedent, the survivor who seeks to establish a half-interest in the property, but is unable to demonstrate a contractual arrangement, will be unable to recover the value of services

[21] Comment, *Inverse Condemnation in Washington—Is the Lid Off Pandora's Box?*, 39 WASH. L. REV. 920, 938 (1965).

and labor contributed to the property, and such labor and services will be deemed a gift to the decedent. *Humphries v. Riveland,* 67 Wash. Dec. 2d 371, 407 P.2d 967 (1965).

Property acquired during cohabitation of a man and woman can be community property only if they are husband and wife.[1] Washington cases establish the rebuttable presumption, relied upon by the court in the principal case, that parties to a meretricious relationship intended ownership to rest with title.[2] Generally, before partnership or joint venture theories will apply, the parties must have engaged in some form of commerce or business.[3] Moreover, there cannot be a resulting trust unless the person claiming ownership furnished the consideration for the property, and there was intent to preclude ownership in the titleholder.[4]

While the court discussed the various theories upon which plaintiff predicated her action, and presented a panorama of various Washington cases, its reasoning was somewhat obscure. Although it recognized that *Creasman v. Boyle*[5] was inapposite on its facts, it relied upon the presumption stated in that case that ownership of property acquired during a meretricious relationship will follow title. Emphasizing the fact that plaintiff's "husband" was a businessman, and therefore knowledgeable of basic property rules,[6] the court applied the *Creasman* presumption and concluded that plaintiff should recover nothing.[7]

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[1] Poole v. Schrichte, 39 Wn. 2d 558, 236 P.2d 1044 (1951).

[2] Walberg v. Mattson, 38 Wn. 2d 808, 232 P.2d 827 (1951); Creasman v. Boyle, 31 Wn. 2d 345, 196 P.2d 835 (1948).

[3] See Eder v. Reddick, 46 Wn. 2d 41, 49, 278 P.2d 361, 365 (1955), where the court said that a partnership contract must unite the "labor, skill, or property of the parties, for the purpose of engaging in lawful commerce or business for the benefit of all of them...."

[4] Walberg v. Mattson, 38 Wn. 2d 808, 232 P.2d 827 (1951).

[5] 31 Wn. 2d 345, 196 P.2d 835 (1948), 24 WASH. L. REV. 164 (1949). *Creasman* is distinguishable from the principal case in that the plaintiff furnished all the consideration for the real property and allowed title to be taken in the name of his paramour, who thereafter died. Thus, *Creasman* is virtually the obverse of the principal case.

[6] It appears that the majority opinion unduly emphasized the fact that decedent was a masonry contractor "experienced in business transactions relating to the purchase and sale of real property...." 67 Wash. Dec. 2d at 387, 407 P.2d at 976. While he may have been careless in handling familial transactions, it does not follow that the plaintiff should be penalized.

[7] In reaching its result, the court relied on the reasoning of Blodgett v. Lowe, 24 Wn. 2d 931, 167 P.2d 997 (1946), that the terms and conditions of an alleged contract should be established before evidence of services claimed to have been performed pursuant to the terms of the alleged contract is admissible. While *Blodgett* is somewhat inapposite, since it involved an oral contract to devise, there appears to be little reason for the court not to have used it in the principal case, particularly since plaintiff sought contractual remedies. On the other hand, that approach may have been the basis for the court's refusal to remand for an evaluation of plaintiff's services and the potential imposition of an equitable lien.

Washington cases demonstrate that, unless a party to a meretricious relationship demonstrates some collateral agreement or business venture, his chance of establishing a right in property accumulated during the relationship is rather small.[8] In the *Creasman* case, for example, the plaintiff "husband" sought declaration of a resulting trust in a house purchased by him, but with his "spouse" named as titleholder. In denying relief, the court held that he had not produced sufficient evidence to overcome the presumption that parties "considerably more than 'domestic strangers' to each other" dispose of property according to the intent of the purchaser, the underlying hypothesis being that the purchaser made a gift to the titleholder.

On the other hand, when the parties separate after having invested in business property, the court will grant relief more readily. In the leading Washington case, *Poole v. Schrichte*,[9] the couple invested, during their cohabitation, in a tavern and various other items, most of which were personal property. While the court awarded plaintiff half of the personal property, it also awarded her the monetary equivalent of a half-interest in the tavern. Since the evidence showed that she financed half its cost, the court found no difficulty in avoiding *Creasman* and characterizing the transaction as a "joint venture or partnership." In so doing, the court ignored the meretricious aspect of the relationship and proceeded on contract and partnership theories, thereby establishing that the illegality of a meretricious relationship does not, as a matter of policy or law, necessarily taint other transactions between the parties.

When the plaintiff cannot establish a business venture, as in *Poole*, the cases seem to indicate that successful establishment of a pooling agreement or a constructive trust, as a practical matter, turns more than anything else on whether both parties are alive and able to testify.[10] This situation, no doubt, arises from the evidentiary barrier of the dead man's statute,[11] and largely accounted for the inability of

[8] *Compare* Walberg v. Mattson, 38 Wn. 2d 808, 232 P.2d 827 (1951) (collateral agreement), and Poole v. Schrichte, 39 Wn. 2d 558, 236 P.2d 1044 (1951) (business venture), *with* Creasman v. Boyle, 31 Wn. 2d 345, 196 P.2d 835 (1948).

[9] *Ibid.*

[10] *Compare* Creasman v. Boyle, 31 Wn. 2d 345, 196 P.2d 835 (1948), Engstrom v. Peterson, 107 Wash. 523, 182 Pac. 623 (1919), and Stans v. Baitey, 9 Wash. 115, 37 Pac. 316 (1894), *with* West v. Knowles, 50 Wn. 2d 311, 311 P.2d 689 (1957), Walberg v. Mattson, 38 Wn. 2d 808, 232 P.2d 827 (1951), Poole v. Schrichte, 39 Wn. 2d 558, 236 P.2d 1044 (1951), and Hynes v. Hynes, 28 Wn. 2d 660, 184 P.2d 68 (1947). In the former group of cases, plaintiff surviving member of a meretricious relationship was unsuccessful; in the latter group, where both parties were before the court, plaintiffs recovered.

[11] WASH. REV. CODE § 5.60.030 (1956).

the plaintiff in the principal case to recover. The court, in fact, seems to imply that the *Creasman* presumption was primarily designed to apply in cases in which the dead man's statute limits admissible evidence.[12]

Judge Hamilton, in his dissenting opinion, observed that, had plaintiff's evidence revealed a specific monetary expense, the court would have had no trouble impressing a *pro tanto* equitable lien upon the property.[13] The dissenters emphasized that the plaintiff should have recovered the reasonable value of her labor in the accumulated property and/or the amount which this labor caused the property to appreciate in value, in order to avoid unjust enrichment of the decedent's heirs. While this relief would have been preferable to the result reached by the majority, it would still circumvent the question whether the survivor of a meretricious relationship will be allowed a half-interest in property accumulated during their cohabitation. Plaintiff's desire was to establish the type of interest derived not from a showing of a particular investment, but from a general understanding between the decedent and herself. To demand proof along strict contractual lines is unrealistic; most people simply do not realize all the legal implications of their private transactions, and are unlikely to keep detailed financial records in noncommercial activities.

While the result in the principal case followed naturally from the case law, and the *Creasman* presumption in particular, the very closeness of the decision indicates the undesirability of indulging in presumptions, and the advantage of compelling the court to weigh equitably the evidence presented with a view toward doing justice to the parties. The effect of the *Creasman* presumption is not to aid the court in deciding hard cases, but to deny justice by preordaining the result when the plaintiff is unfortunate enough to have had his or her partner die without a written agreement regarding disposition of the property.

Judge Finley inveighed against the confining ownership-follows-title theory of the majority as a "washing of hands device" which is incapable of meeting and providing "real solutions for the real problems of real people."[14] Coupling the *Creasman* presumption with the

[12] 67 Wash. Dec. 2d at 380, 407 P.2d at 972.
[13] *Id.* at 397, 407 P.2d at 982 (dissenting opinion).
[14] *Id.* at 392, 407 P.2d at 979. Judge Finley characterized the *Creasman* presumption, as interpreted by the majority, as *conclusive,* rather than rebuttable, throughout his dissent. While his statements could be misleading if taken in isolation, his construction seems accurate when the presumption is applied to a case involving the dead man statute.

dead man statute, plus requiring clear, cogent, and convincing evidence of a pooling contract, is to demand the unrealistic and effectuate a rule of law which operates purely by accident or, conceivably, by the cunning, anticipatory designs of one of the parties to a meretricious relationship.[15] By choosing this method of disposing of the principal case, the court has created a rule which may prove both difficult and embarrassing. It would have been far more desirable, for example, to adopt the approach of the New York Appellate Division in *Muller v. Sobol*,[16] in which the plaintiff brought an action to impose a trust based on a joint venture despite the fact that his evidence was insufficient to establish an express agreement to pool property. Notwithstanding this, the court decreed a half-interest in the accumulated property to the plaintiff "husband" to the meretricious relationship, on the theory that such an agreement was *implicit in the relationship*—the idea being that it was unrealistic to believe that the parties would contribute money and labor to such a relationship for twenty-two years without such an agreement. This approach is not only more realistic than that of the majority in the principal case, but it is consonant with the view that parties to a meretricious relationship are not so reprehensible that their formal or informal arrangements are thereby rendered unenforceable.[17]

Adoption of an approach similar to that of the New York court is most desirable because of its conformity to the probable intent of the parties and its congruity with current mores. Alternatively, the dissenters' conclusion that the plaintiff should recover the value of her labor and monetary contribution by way of imposition of an equitable lien is a potentially satisfactory result. Their approach is merely "potentially" satisfactory because it may be, as a practical matter, that the dead man statute could still prevent all but minimal recovery. In addition, the need for rigorous documentary proof of monetary contribution, or the pitfalls implicit in attempting to evaluate labor, particularly in domestic areas, may lead to unsatisfactory results. However, while less desirable than the approach of the New York court, the minority view would not only provide greater redress to the surviving member of a meretricious relationship than the result reached

[15] See the concurring opinion of Finley, J., in West v. Knowles, 50 Wn. 2d 311, 315-21, 311 P.2d 689, 692-95 (1957).
[16] 277 App. Div. 884, 97 N.Y.S.2d 905 (1950).
[17] This attitude is implicit in Poole v. Schrichte, 39 Wn. 2d 558, 236 P.2d 1044 (1951), discussed in text accompanying note 9 *supra*.

in the principal case, but it also would foster a flexibility which could prove to be advantageous in the future.

APPLICABILITY OF REAL ESTATE SALES TAX TO TRANSFERS FOR BENEFIT OF UNFORMED CORPORATION

A corporate promoter entered into an earnest money agreement which contemplated corporate purchase of real property. At the planned closing date, the incorporation process was incomplete. To avoid losing the property, the promoter entered into a real estate contract naming himself and two nominees as purchaser-trustees to hold the property in trust for the benefit of the proposed corporation. The one-percent real estate sales tax[1] was paid by the seller, since the transfer to the trustees constituted a sale.[2] One month later, the beneficiary was incorporated. Pursuant to the trust agreement, the trustees transferred the property to the corporation by quitclaim deeds executed separately by each trustee for nominal consideration. King County assessed an identical tax upon this transfer, contending that it was a second sale. The trustees, who were incorporators, paid the tax under protest, claiming double assessment, and brought action to recover the tax. On appeal, judgment for plaintiffs was affirmed. *Held*: Where an earnest money agreement for purchase of real property expressly contemplates that the purchaser will be a corporation, and the incorporators accept title in trust since the incorporation process is incomplete, the subsequent conveyance of title from the incorporators to the beneficiary corporation is not a "sale" and hence not a taxable event for purposes of the transfer tax. *Senfour Investment Co. v. King County,* 66 Wash. Dec. 2d 61, 401 P.2d 319 (1965).

The sales tax statute provides that: "the term 'sale' shall have its ordinary meaning and shall include any conveyance . . . for a valuable consideration, and any contract for such conveyance . . . ."[3] The import of these provisions is that application of the tax depends upon the transfer of an interest in land for valuable consideration. In *Deer Park Pine Indus. v. Stevens County*,[4] the court held that, since stockholders

[1] WASH. REV. CODE § 28.45.050 (1963) provides: The county commissioners of any county are authorized by ordinance to levy an excise tax upon sales of real estate not exceeding one per cent of the selling price.
[2] WASH. REV. CODE § 28.45.010 (1963).
[3] WASH. REV. CODE § 28.45.010 (1963).
[4] 46 Wn. 2d 852, 286 P.2d 98 (1955).