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The Community Property Agreement Statute

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COMMENTS

THE COMMUNITY PROPERTY AGREEMENT STATUTE

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What is the meaning of our community property agreement statute, REM. REV STAT. § 6894 [P.P.C. § 434-39]? Now might be a proper time to examine it and to attempt to determine its purpose, how it has been interpreted, and how well it carries out the purpose for which it was enacted. Though it was enacted by the territorial legislature in 1879, there have been few cases involving community property agreements.

Either through fear of the community property agreement statute or through dislike for it, attorneys, if they can avoid doing so, seldom use it. Title insurance companies are not anxious to insure the title of property conveyed under it, because, they say, it fails to make a record of itself. Before they will insure the title to property received by the surviving spouse under a community property agreement, they not only require an affidavit that all creditors have been paid, a certificate from

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the state tax commission that no inheritance taxes are due or that the inheritance taxes have been paid, a certificate of death of the spouse, and of course, a recording of the agreement, but also a greatly increased insurance premium.[1]

The statute in question reads as follows:

> Nothing contained in any of the provisions of this act, 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 afterward to be acquired, to take effect upon the death of either. But such agreement may be made at any time by the husband or 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 rights 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

What Is the Community Property Agreement?

The community property agreement prior to the death of the first dying spouse, though it passes no title or interest in the property covered by it, is a binding contractual agreement.[2] Both parties must agree in order to change or modify the agreement.[3] Upon the death of one spouse, his community property interest will pass according to the community property agreement.[4] It will pass to the survivor, giving him an absolute ownership or some lesser interest in the property If by the community property agreement some lesser interest than an absolute ownership passed to the survivor, the agreement would probably also limit the survivor's control over the interest he had in the community property; so that the survivor would have the same limited control over the whole of the property Such a community property agreement was involved in a recent case.[5] *H* and *W* entered an agreement whereby the survivor was to have a life estate in the property with an unlimited

[1] If the surviving spouse wishes to insure the title within two years of the death of the other spouse, this premium is twice the amount of the usual premium. For insurance from two to six years of the death of the first spouse, the premium is half again the usual premium. After six years from the death of the first spouse, the regular premium is charged.

[2] McKnight v. McDonald, 34 Wash. 98, 74 Pac. 1060 (1904).

[3] Rem. Rev. Stat. § 6894 [P.P.C. § 434-39].

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

[5] *In re* Dunn's Estate, 31 Wn.(2d) 512, 197 P.(2d) 606 (1948).

right to use, expend, and dispose of it. Any remainder left at the death of the survivor was to go to their children. The court, in that case, held in effect that the survivor had a reserved fee with a testamentary limitation as to his half of the community property, and a life estate with power to consume as to the other half of the community property. The children received an executory limitation as to one half of the property and a vested remainder subject to being divested as to the other half. Up until the death of one spouse each had a contractual right to have this transfer occur if the other died first. Also the one dying first had the assurance that the other would be bound by the limitations or conditions placed in the agreement. The limitation here was that the survivor would not dispose of any property remaining at his death by testamentary disposition, but that it should go to their children.

The requirements of capacity to enter a community property agreement are not mentioned in the statute, nor are there any cases establishing what the requirements are. With the provision in the statute saying that "Nothing contained . . . in any law of this state, shall prevent the husband and wife from jointly entering into any agreement . . ." a minor might have a difficult time arguing that the agreement should not be binding as to him. Although the statute provides for the setting aside of an agreement for fraud or other equitable reasons, it seems doubtful whether an agreement could be set aside on the grounds of lack of legal age alone. "Fraud or other equitable reasons" is more often applied to unconscionable advantage, duress, insanity of one party, or undue influence. Probably on any of these latter grounds the agreement could be set aside.[6] To be probated the age requirement as well as all the other requirements would have to be met.[7] To be enforced as a contract to convey, certainly all of these requirements would have to be met.[8]

The scope and use of the community property agreement is necessar-

[6] Normile v. Denison, 109 Wash. 205, 186 Pac. 305 (1919); Kilbourne v. Kilbourne, 156 Wash. 440, 287 Pac. 41 (1930); Rennebohm v. Rennebohm, 153 Wash. 102, 279 Pac. 402 (1929).

[7] *In re* Dunn's Estate, 31 Wn.(2d) 512, 197 P.(2d) 606 (1948) held an instrument containing a community property agreement could be probated. The right to probate the instrument which contains a community property agreement, however, is not a part of the community property agreement, but rather is a right which is independent of and distinct from the community property agreement. As another contract may be probated as a joint will if executed with the formalities required of a will by REM. REV. STAT. § 1395 [P.P.C. § 219-3], and if it fulfills the requirements of REM. REV. STAT. § 1394 [P.P.C. § 219-1], so may a community property agreement.

[8] If the right exists to enforce a community property agreement as a contract to convey, it is a contract right which is independent of and distinct from the community property agreement.

ily broad. It would seem that all property held as community property by the spouses, whether real or personal, tangible or intangible, can come under such an agreement. Under the doctrine of *Volz v. Zang*[9] all property formerly held by the spouses as either separate or community property can be subjected to this instrument,[10] and further, all future property interests acquired by the spouses can likewise be affected by the agreement.[11] Various property interests less than a fee absolute can be given the survivor.[12] In fact, there seems to be no reason in theory why he might not be cut off entirely. In drawing up such an agreement the formalities provided by the statute must be followed. If the agreement is not properly drafted and executed, it will be ineffective.[13] Whether the instrument can be effective as a contract to convey property will depend upon the attitude of the court and the agreement itself. There have been no cases involving this precise question; there is, however, dicta in early cases to the effect that the statute precludes the husband and wife from entering into any agreement affecting their property interest except as expressly provided by the statute.[14] The court might hold that enforcing such an agreement, if not properly drawn and executed, would be contrary to the statute of wills. On the other hand, it might follow the line of reasoning used in the cases dealing with agreements to make joint wills.[15] If, in addition to the drawing and executing of the document as provided by statute, the document is drawn and executed with the formalities required of a will, it could be probated as such.[16] Thus we have as a result an instrument which could be used in many ways; it may cover all types of property held by the parties as either their separate or community property; it may give the survivor any interest in the property or no interest at all; if improperly executed or drawn, it might be enforced as a contract to con-

[9] Volz v. Zang, 113 Wash. 378, 194 Pac. 409 (1920) held an agreement by husband and wife making all their property community property was fully effective.

[10] "Instrument" has been used in this article to denote a paper containing rights in addition to or distinct from the rights inherent in a community property agreement.

[11] *In re* Brown's Estate, 29 Wn.(2d) 20, 185 P.(2d) 125 (1947), the agreements provided "such property as they now own or may hereafter acquire from any source whatsoever, shall be considered as community property and shall upon such death immediately become the sole property of the survivor of them." In Bartlett v. Bartlett, 183 Wash. 278, 48 P.(2d) 560 (1935), the agreement provided "every and all the property both personal and real now owned by either or both of said parties, together with any other property by them hereafter acquired . . ." should be part of said agreement.

[12] *In re* Dunn's Estate, 31 Wn.(2d) 512, 197 P.(2d) 606 (1948).

[13] Bloor v. Bloor, 105 Wash. 110, 119, 177 Pac. 722 (1919).

[14] Board of Trade of Seattle v. Hayden, 4 Wash. 263, 30 Pac. 87, 32 Pac. 224 (1892); Bloor v. Bloor, *supra* note 13.

[15] See note 24 *infra*.

[16] *In re* Dunn's Estate, 31 Wn.(2d) 512, 197 P.(2d) 606 (1948).

vey property; and it may be probated as a will or merely filed as a deed of conveyance.

The statute requires that a community property agreement be executed with the same formalities required of deeds to real estate, but there is nothing in the statute or in the cases dealing with the statute saying when, if at all, the agreement must be recorded. In none of the cases dealing with such an agreement has it been recorded prior to the death of the first dying spouse. In several of the cases the agreement was not recorded at all and was still held valid.[17] The community property agreement may be recorded after the death of the first spouse as in the case of any deed to real estate, but recordation, it would seem, is not a requirement. The question becomes whether or not it may be recorded prior to the death of either spouse, and if so what effect would recordation have. Because it is executed with the formality required of a deed, there seems to be no reason why it could not be recorded.[18] Although it is not effective as a deed until the death of one spouse, if recorded prior to the death of the first spouse, there seems to be no reason why it would not be record notice to anybody purchasing the property from the survivor.[19] Because no property interest is affected prior to the death of one spouse,[20] it could not operate to give notice prior to that time. The advantage of filing prior to the death of either spouse would be the assurance that the survivor would not disregard the agreement, which he might do if there was no other evidence of it than the agreement itself which he had in his hands and could destroy

The statute provides that altering or amending a community property agreement must be done with the formality required in executing a deed to real estate. Because no property is affected by the agreement prior to the death of one spouse, this provision must apply to the agreement itself and not to the property covered by it.[21] Transfer of any

[17] Recording of the agreement is not delivery. The delivery problem of mutual deeds discussed in Bloor v. Bloor, 105 Wash. 110, 119, 177 Pac. 722 (1919), does not exist here. Either, as suggested in McKnight v. McDonald, 34 Wash. 98, 74 Pac. 1060 (1904), there is no delivery necessary or the proper execution of the agreement is effective delivery.

[18] *Cf.* Effert v. Ford, 21 Wn.(2d) 152, 150 P.(2d) 719 (1944).

[19] *Cf.* REM. REV. STAT. § 10571 [P.P.C. § 497-11], and REM. REV. STAT. § 10601 [P.P.C. § 477-39].

[20] A distinction should be made between the community property agreement and an instrument which contains a community property agreement and a clause incorporating the doctrine of Volz v. Zang, 113 Wash. 378, 194 Pac. 409 (1920). Upon execution of such an instrument, the clause would affect an immediate transfer of the separate property of the spouses to their community estate.

[21] In Hesseltine v. First Methodist Church of Vancouver, 23 Wn.(2d) 315, 161 P.(2d) 161. (1945), it was held that the agreement did not restrict the alienation of community real property by deed properly executed by both members of the com-

property covered by the agreement prior to the death of either spouse in effect would take it out of the agreement. Upon the death of either spouse, thereafter, the agreement would be unchanged as to terms and would apply to any property remaining. Although nothing is said in the statute about revoking such an agreement, one would think that this could be done in the same way as is provided for its amendment or by transferring all the property covered by it to a third party so that there would be no longer any property on which it could operate.[22]

It might be proper to ask if the community property agreement statute is a statutory codification of one of the common forms of property conveyance or property ownership. With this in mind, let us attempt to compare it with some of these common forms.

Compared With Joint Will

In some respects the joint will and the community property agreement are similar. After the death of the first spouse, the effect of the joint will is similar to that of the community property agreement. In the case of the joint will the surviving spouse is bound by the agreement made with the deceased spouse and must deal with the property in accordance with that agreement.[23] This is true although the joint will was not drawn up with the formality necessary to permit its probate as a will.[24] In the case of the community property agreement, the surviving spouse is also bound by it whether or not it was executed with the formality required of a will.[25] Both the joint will and the instrument containing the community property agreement must be executed with the formality required of wills generally in order to be probated.[26] Both are said to be ambulatory until the death of the first dying spouse. Here

munity. Because by Rem. Rev. Stat. § 6892 [P.P.C. § 434-27], the husband has the management and control over all community personal property, the wife would not have to join in transferring community personal property to free it from the agreement.

[22] Prior to the death of either spouse the status of property covered by a community property agreement seems analogous to the status of property covered by a will prior to the death of the testator. If this is true, a community property agreement referring to specific property would not attach to the proceeds from a sale of property covered by the community property agreement as funds representing the property sold.

[23] Cummings v. Sherman, 16 Wn.(2d) 88, 132 P.(2d) 998 (1943); Prince v. Prince, 64 Wash. 552, 117 Pac. 255 (1911).

[24] Allen v. Dillard, 15 Wn.(2d), 35, 129 P.(2d) 813 (1942); Auger v. Shideler, 23 Wn.(2d) 505, 161 P.(2d) 200 (1945); Forsberg v. Everett Trust & Savings Bank, 31 Wn.(2d) 932, 200 P.(2d) 499 (1948).

[25] *In re* Brown's Estate, 29 Wn.(2d) 20, 185 P.(2d) 125 (1947); Hesseltine v. First Methodist Church of Vancouver, 23 Wn.(2d) 315, 161 P.(2d) 161 (1945); see note 7 *supra*.

[26] A will to be effective as such must be executed with the formalities specified in Rem. Rev. Stat. § 1395 [P.P.C. § 219-3].

the analogy stops. Whereas the community property agreement must be between a husband and his wife, the joint will may be between any two or more persons who have testamentary capacity. The joint will may be revoked at any time before the death of the first spouse without the consent of the other.[27] The law only requires that he or she give notice to the other of the revocation. This is not true in the case of the community property agreement, which may be revoked only by the consent of both parties. If the joint will is not properly drawn or executed, the agreement may still be enforced as a contract to convey by specific performance in equity.[28] The community property agreement, to be effective, must be executed with the formalities required by statute for a deed.[29] If it is so drawn, title passes automatically upon death of the first spouse.[30]

COMPARED WITH JOINT TENANCY AND TENANCY BY THE ENTIRETY

At common law a joint tenancy arose where two or more persons received property to hold jointly and where there was a unity of interest, a unity of title, a unity of time, and a unity of possession. A unity of interest meant that the interests of all were coextensive; a unity of time meant that the interests of all commenced at one and the same time; a unity of possession meant that the tenants held the same undivided possession of the whole and enjoyed the same rights until the death of one; a unity of title meant that the tenants derived title from one conveying instrument. Tenancy by the entirety required, in addition to the above requirements for joint tenancy, that the tenants be husband and wife. The chief incident of both such estates was the right of survivorship.[31]

The resemblance between a conveyance setting up joint tenancy and a community property agreement is slight. Unless otherwise provided, the conveyance setting up the joint tenancy is immediately effective. The passage of title to the land takes place at that time,[32] and the instrument may be recorded at that time, and if recorded, will give record notice. Although binding from the time it is executed, the community property agreement passes no title prior to the death of the first spouse. Property coming under the agreement may be conveyed to others free

[27] Allen v. Dillard, 15 Wn.(2d) 35, 129 P.(2d) 813 (1942).
[28] See note 24 *supra*.
[29] As already mentioned, if the community property agreement is improperly drawn or executed, it might possibly be enforced as a contract to convey.
[30] McKnight v. McDonald, 34 Wash. 98, 74 Pac. 1060 (1904).
[31] 2 TIFFANY, REAL PROPERTY (3rd ed. 1939) § 419.
[32] Hernandez v. Becker, 54 F.(2d) 542, C.C.A. 10th (1931).

of the agreement. Perhaps the agreement may be recorded prior to the death of either spouse, but even if recorded, it would probably give no notice.[33]

Even if title passed at the time of the execution of the community property agreement, it would not fulfill all the requirements of joint tenancy set out above. An axiom at common law was that one could not convey property to himself.[34] A document which attempted to convey property to the grantor and another would be effective only to pass the interest to the other. The interest which the grantor was to receive by the document would not pass by the document, but rather would be reserved by the document. Because the grantor did not receive an interest from such a document, he could not set up a joint tenancy between himself and another. The unities of time and title would be absent. Because the husband and wife are each grantors as to one half of the community property, they could not create a joint tenancy between themselves of community property by common law standards.[35] They might by the standards laid down by at least some courts in the United States.[36] These courts have receded from the common law position of requiring the presence of the four unities in order to have joint tenancy. In Washington, dicta in several cases indicates that the unities of time and title would not be required in order to have joint tenancy.[37]

Actually the only similarity which could exist between joint tenancy and a community property agreement would be in the situation after the death of one tenant or one party to the agreement. If the original conveyance of the property to be held in joint tenancy was to husband and wife, the ownership given the survivor *could* be similar to the ownership given the survivor in a community property agreement. In a joint tenancy, all the interest in the property held by the joint tenants would continue in the survivor.[38] This need not be the case in a community property agreement. The similarity here then is only coincidental and happens only after the joint tenancy has ended.

[33] REM. REV. STAT. § 10596-2 [P.P.C. § 500-3].

[34] 2 TIFFANY, REAL PROPERTY (3rd ed. 1939) § 432; 62 A.L.R. 514.

[35] See Crutcher, *Survivorship in Joint Bank Accounts, and Wilson v. Ivers*, 16 WASH. L. REV. 105, 108.

[36] Irvine v. Helvering, 99 F.(2d) 265, 268, C.C.A. 8th (1938) and Edmonds v. Commissioner, 90 F.(2d) 14, 16, C.C.A. 9th (1937) citing cases from N. Y., Mass., and R. I.

[37] Tacoma Savings & Loan Ass'n. v. Nadham, 14 Wn.(2d) 576, 128 P.(2d) 982 (1941); *In re* Ivers' Estate, 4 Wn.(2d) 477, 104 P.(2d) 467 (1940); *In re* Peterson's Estate, 182 Wash. 29, 45 P.(2d) 45 (1935).

[38] 2 TIFFANY, REAL PROPERTY (3rd ed. 1939) § 419.

COMPARED WITH JOINT SAVINGS ACCOUNT

Though the Washington court in many cases has spoken of the joint savings account as being joint tenancy, it seems that it is not. The joint savings account differs materially from joint tenancy as it existed at common law, not only in the way in which it is created but also as to its actual effects. The Washington cases which term the joint savings account joint tenancies deal only with the survivorship aspect.[39] Here, evidently, the two are the same. The unities of time and title required for common law joint tenancies are not present in the joint savings account. The right of withdrawal contained in the joint savings account is contrary to the theory of joint tenancy. This, in effect, amounts to the privilege of ouster.[40] Also at common law, joint tenancy dealt with real property.[41] Joint savings accounts deal with choses in action. In many of the cases involving a joint savings account, the funds deposited were community funds. The court held in a recent case that it requires clear, certain, and convincing evidence to establish that the husband and wife intended to change the status of community property to that of joint ownership.[42] This would seem to rule out joint tenancy in a large share of the cases where the right of survivorship to funds in joint savings accounts has been upheld.[43]

Rather than analogizing the joint savings account with joint tenancy, it might be better to analogize the joint savings account with the New York tentative trust doctrine.[44] The tentative trust doctrine provided a method of avoiding probate in the case of small estates where no creditors were involved. Our court, by the use of the savings account doctrine, has reached the same result as the courts following the tentative trust doctrine without using that fiction. In Washington there have been no cases dealing with survivorship under a joint savings account where the rights of creditors were involved. Very possibly, if this problem were presented to the court, it would hold as have the courts fol-

[39] *Cf.* Tacoma Savings & Loan Ass'n v. Nadham, 14 Wn.(2d) 576, 128 P.(2d) 982, (1941); *In re* Ivers' Estate, 4 Wn.(2d) 477, 104 P.(2d) 467 (1940).

[40] 2 TIFFANY, REAL PROPERTY (3rd ed. 1939) § 449.

[41] 2 TIFFANY, REAL PROPERTY (3rd ed. 1939) § 418.

[42] Munson v. Hays, 29 Wn.(2d) 733, 189 P.(2d) 464 (1948).

[43] Tacoma Savings & Loan Ass'n v. Nadham, 14 Wn.(2d) 576, 128 P.(2d) 928 (1941); *In re* Ivers' Estate, 4 Wn.(2d) 477, 104 P.(2d) 467 (1940); Nelson v. Olympia Federal Savings & Loan Ass'n., 193 Wash. 222, 74 P.(2d) 1019 (1938); *In re* Peterson's Estate, 182 Wash. 29, 45 P.(2d) 45 (1935).

[44] Often called the Totten Trust after the case where the doctrine was first applied, Matter of Totten, 179 N. Y. 112, 71 N. E. 748 (1904).

lowing the tentative trust doctrine,[45] that the creditors could reach this account.

Looking then to the similarity between the joint savings account held by husband and wife and the community property agreement, we find several characteristics which are common to both. After the death of the first spouse the ownership of the property is automatically in the survivor.[46] Neither has to be probated, and prior to the death of the first spouse the property retains its community aspect and can be dealt with freely by the parties.[47]

The dissimilarities are just as plentiful. The places where the theory of joint savings account may be used are limited. It has been used in cases of shares in building and loan associations, shares in saving and loan associations, credit union shares, accounts in mutual saving banks, saving accounts in ordinary commercial banks, and ordinary commercial bank accounts.[48] The first four are provided for by statute.[49] The community property agreement could probably be used in dealing with any community property, whether personal or real, tangible or intangible.

Dicta in cases have indicated that the joint savings account differs from that of the community property agreement in that, unlike the community property agreement, the respective rights of the parties under a joint savings account come into existence while both are yet alive.[50] The community property agreement and the joint savings account are also said to differ in respect to the time title to the property passes. In the case of the joint savings account, dicta in cases declare

[45] 1 SCOTT ON TRUSTS § 58.5.

[46] This is assuming the typical community property agreement in which the interest of the spouses is given to the survivor; see *In re* Brown's Estate, 29 Wn.(2d) 20, 185 P.(2d) 125 (1947), as to community property agreement; see Winner v. Carroll, 169 Wash. 208, 13 P.(2d) 450 (1932), as to joint savings account.

[47] See Munson v. Hays, 29 Wn.(2d) 733, 189 P.(2d) 464 (1948), as to joint savings account; see Hesseltine v. First Methodist Church of Vancouver, 23 Wn.(2d) 315, 161 P.(2d) 161 (1945), as to community property agreement.

[48] See Tacoma Savings & Loan Ass'n v. Nadham, 14 Wn.(2d) 576, 128 P.(2d) 982 (1941), and Nelson v. Olympia Federal Savings & Loan Ass'n, 193 Wash. 222, 74 P.(2d) 1019 (1938), as to shares in building and loan and savings and loan associations; *see* Winner v. Carroll, 169 Wash. 208, 13 P.(2d) 450 (1932), and *In re* Peterson's Estate, 182 Wash. 29, 45 P.(2d) 45 (1935), as to savings accounts; and see *In re* Ivers' Estate, 4 Wn.(2d) 477, 104 P.(2d) 467 (1940), as to ordinary commercial bank accounts.

[49] Shares in savings and loan association and shares in building and loan association: REM. REV. STAT. (1945 Supp.) § 3717-41 [P.P.C. § 453-95]; credit union shares: REM. REV. STAT. § 3923-10 [P.P.C. § 455-19]; mutual savings bank accounts: REM. REV. STAT. § 3348 [P.P.C. § 316-45].

[50] *In re* Ivers' Estate, 4 Wn. (2d) 477, 104 P.(2d) 467 (1940), Tacoma Savings & Loan Ass'n v. Nadham, 14 Wn.(2d) 576, 128 P.(2d) 982 (1941); *but see* Munson v. Hays, 29 Wn.(2d) 733, 189 P.(2d) 464 (1948).

that the title passes at the time of making the agreement; whereas in the case of the community property agreement, title passes to the survivor upon the death of the first spouse.[51] In the cases where the joint savings account agreement is between husband and wife, these dicta have not been followed. The husband, after the joint savings account agreement, seems to have the same power over the funds deposited therein as he does over any other personal property of the community. The Washington court has held that, when a deposit is made in the form prescribed by the statute for the joint savings account, a presumption arises that the interest of the depositors is that of joint tenancy; but that when proof is presented that the funds deposited were community property, the presumption is met and destroyed.[52] This holding did not overrule the right of survivorship in joint savings accounts of community property, but merely explained the inter vivos nature of joint savings accounts held by husband and wife. If the joint savings account is between parties who are not husband and wife, perhaps a different situation exists. Perhaps the respective rights of the parties come into existence when the joint savings account is taken out and title to the account passes at that time.[53] Any inquiry as to this question is beyond the scope of this article.

It seems then that prior to the death of the first spouse, the community property agreement and a joint savings account between husband and wife are quite similar in effect. The two differ in scope. Whereas the community property agreement must be made between husband and wife and any property owned by the community, whether real or personal, tangible or intangible, may come under such an agreement, the joint savings account agreement need not be made between husband and wife, but only choses in action may come under such an agreement. The property interest given the survivor under a joint savings account is normally that of full ownership of the funds covered. Even if possible, a lesser property interest would not be practical here. This is not so in the case of the community property agreement. The types and amounts of property interests which can be given to the survivor are almost unlimited. Ostensibly at least, probate can be avoided by the use of either. In the case of the joint savings account, probate would have no

[51] *In re* Ivers' Estate, *supra* note 50.

[52] Munson v. Hays, 29 Wn.(2d) 733, 189 P.(2d) 464 (1948).

[53] At least the court is more reluctant to declare that the account is a joint savings account; *cf.* Daly v. Pacific Savings & Loan Ass'n, 154 Wash. 239, 286 Pac. 60 (1929) and *In re* Ivers' Estate, 4 Wn.(2d) 477, 104 P.(2d) 467 (1940), but *cf.* Winner v. Carroll, 169 Wash. 208, 13 P.(2d) 450 (1932).

function to perform. If the rights of creditors are to be protected, they must come in of their own initiative and file claims to the funds.[54] Because this would be an equitable proceeding, and also because of the difficulty of following money, the creditors must move fast in order to have any hope for recovery. Under the community property agreement, probate is done away with, in theory at least; the rights of creditors, however, are specifically protected. Legally they have a right to have their claims paid from the property belonging to the deceased until the statute of limitations would bar recovery.

What Advantages and Disadvantages Does the Community Property Agreement Have Over These Common Forms?

As has been seen, the community property agreement differs in some respects from all the common forms of property conveyance and property ownership. In what respect can this be an advantage and where will it be a disadvantage?

The community property agreement has the advantage over the joint will, the joint ownership, and over the joint savings account in having a possibly broader and more flexible use. If properly executed, the instrument containing the agreement may be probated as a will or merely recorded as a deed. All kinds of property and property interests may be covered, and all types of property interests or no interest at all may be given the survivor. Only in the requirements that it be between husband and wife and that community property be covered, is it more restrictive.[55]

The community property agreement statute has a distinct disadvantage in not having a sufficient body of law built up concerning it to enable one to know its boundaries, effects, and exactly what it is. Much of what is said about the scope and use of the community property agreement is necessarily conjecture. To settle much of the law concerning community property agreements would necessitate litigation. The law, however, on the scope and use of the other mentioned forms is more settled. This is certainly true of joint wills. Although the Washington cases do not abound with direct holdings on joint tenancy, many

[54] As has been suggested previously, our court might follow the lead of the states following the tentative trust doctrine and permit creditors of the decedent to come against the funds which he held with another under a joint savings account.

[55] The doctrine of Volz v. Zang, 113 Wash. 378, 194 Pac. 409 (1920), destroys the importance of the limitation that the property be community property.

of them contain dicta as to its scope, use and nature in this state. Also joint tenancy is not new. It was popular in England before the United States received its independence.[56] There are still many chapters to be written on the law of joint savings accounts. Even here, however, the applicable law is better known, and conjecture is less in the realm of pure guesswork. This is true not only because of the great body of cases on joint savings accounts in Washington, but also because they involve a situation where there is much precedent to be found in the law of other states. The community property agreement is unique.

The formalities required for the creation of a community property agreement are much more strict than those required for a joint ownership or a joint savings account. If the formalities are not followed, one can only guess as to what effect would be given to the agreement. Also, although joint savings accounts and joint ownership require few formalities, there seems to be less chance of stumbling by accident into either of them than into a community property agreement. A joint savings account is not likely to be created by accident. People intend to deposit money when they do so. The terms and effect of such a deposit is plainly and simply printed upon the card which depositors fill out. Both must sign the card. No great amount of intelligence or knowledge of the English language is required for the depositors to ascertain the effect of their act. In Washington the presumption is against creating a joint tenancy. To do so the intention must clearly be shown.[57] This is not a field where technical words govern, where one by the use of certain words may say something when he means something else. The likelihood of one accidentally creating a joint tenancy is not great. A community property agreement, on the other hand, might be created by attempting to do something else. The formality required to create a community property agreement is a formality which is not uncommon in the execution of formal documents generally. For example, a community property agreement might be created when a husband and wife executed a document which they intended only to be an inter vivos revocable trust or a joint will.

The joint ownership, joint savings account, and the joint will all can be ways of cutting off the rights of dilatory creditors. A creditor of a deceased joint owner has no right to the property held by the surviving joint owner. Even if a creditor of a deceased owner of part of a joint

[56] 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2nd ed.) 20.
[57] *In re* Ivers' Estate, 4 Wn.(2d) 477, 104 P.(2d) 467 (1940).

savings account could reach the funds passing to the survivor, he would have to move fast. A creditor of the deceased under a joint will must file his claim within the time provided by statute, or he will be cut off. No provision, however, is made in the community property agreement for cutting off the rights of creditors.

The community property agreement has both the advantages and disadvantages of the other forms in that it is more difficult to change or revoke. The agreement cannot be changed without the consent of both parties. It is not clear whether it can be revoked at all.[58] Probably, however, the same rules for changing or altering a community property agreement would apply to revoking such an agreement. Requiring the same formalities for changing an agreement as that required for the execution of a deed makes any change arduous. After the parties have executed such an agreement, they have the assurance that it binds them, no matter what happens, unless they both formally agree to change it. As long as the husband and wife continue to live together amicably, no problem is presented, but if they have marital difficulties, the agreement could be used improperly by one against the other. Also, if one of the spouses loses his or her sanity for a considerable length of time, circumstances might so change as to make an alteration or revocation of the agreement wise. This, of course, could not be done.[59] Agreement of the parties is not a necessary requirement for the dissolving of a joint will, joint ownership, or joint bank account.[60]

Under the joint will and the community property agreement, some tax savings to the second dying spouse or the second dying person can be had which are not available to the second dying person under a joint ownership or joint savings account. If the joint will or community property agreement provides that the survivor shall receive only a life estate in the property passing from the deceased, the property passing from the deceased will not be taxable at the survivor's death. Under the joint ownership and joint savings account, the survivor takes a fee, and hence the whole property is taxable again at his or her death.

[58] See the statute; *In re* Brown's Estate, 29 Wn.(2d) 20, 185 P.(2d) 125 (1947), however, suggests that it can be revoked.

[59] If after execution of a community property agreement, one party went insane, the agreement would be irrevocable until that party again attained sufficient mental capacity to give his consent to an alteration or revocation. *In re* Brown's Estate, *supra* note 58.

[60] A joint will may be revoked without incurring any liability by giving notice to the other party to the will, Allen v. Dillard, 15 Wn.(2d) 35, 129 P.(2d) 813 (1942). Joint ownership may be dissolved by a voluntary or involuntary conveynace by one joint tenant, 2 TIFFANY, REAL PROPERTY (3rd ed. 1939) § 425. A joint bank account may be dissolved by one party withdrawing the funds.

Has the Statute Succeeded in Carrying Out the Purpose for Which It Was Created?

The purpose of the statute seems pretty clearly to have been to remove the necessity of administering the community property upon the death of one spouse. The purposes of administration are to pay the debts of the decedent, to pay the inheritance tax due upon the property, and to prove the title to the property passing from the decedent to his heirs, devisees, or legatees. An effectual community property agreement would have the advantages of doing the above and yet remove the expense of administration and the necessity of tying up the property for a long period of time. Ostensibly at least, the statute does these things. The title to the property owned by the community is transferred to those whom the deceased would wish to take and in the proportions in which he would wish them to take. Administration need not be gone through; therefore, the expenses of administration and tying up the title to the property are eliminated. Also the rights of creditors are protected by the statute, and the state by other statutes would have no difficulty in getting the taxes due it.

Many of these results are not real. Though title to the property passes to those whom the decedent would wish to take, it passes with a cloud. This cloud caused by possible outstanding creditors cannot be removed short of the statute of limitations without having an action to quiet title.[61] Also the property may be subjected to possible inheritance taxes. The statute makes no provision for this. Although the statute says that the rights of creditors shall be protected, it does not say how. No time limit is set upon the filing of their claims, and no provision is made for the giving of notice to them. If the community property consisted of personal property and especially intangible personal property, the creditors might find difficulty in realizing upon their debts. The advantages of removing the necessity of administration, i.e., the tying up of property for a long period of time and the removal of expense of probate, are real only where there are no outstanding creditors and where the property involved is solelv personalty.

[61] *In re* Collins' Estate, 102 Wash. 697, 173 Pac. 1106 (1918); State *ex rel.* Mann v. Superior Court, 52 Wash. 149, 100 Pac. 198 (1909); State *ex rel.* Speckert v. Superior Court, 48 Wash. 141, 92 Pac. 942 (1907).