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Divorce Decree—Procedure to Invoke Jurisdiction to Modify

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although limiting its application to situations where there is an absence of evidence of intent of the purchaser. This is indeed a narrowing of that exception since perhaps the only situation where there will be an absence of evidence of contrary intent will be where the meretricious spouse is dead and RCW 5.60.030 [RRS § 1211; P.P.C. § 938-3] bars testimony by the surviving "spouse" of what he intended. This limitation is again stated in the recent case of *Poole v. Schrichte,* 139 Wash. Dec. 515, 236 P. 2d 1044 (1951), although this case did not involve the problem of resulting trust. In the *Poole* case the meretricious husband claimed to be the owner of all the property jointly acquired by the meretricious parties, since title was in his name. The court gave the meretricious wife one-half of the property, stating that the result of the *Creasman* case was due to a lack of evidence of intent on the part of the grantor. By dictum the court declared that in each instance where the parties to a meretricious relationship had been left in the position in which they had placed themselves, one of the parties had been dead. It does not seem proper to change a presumption of intent simply because of a lack of evidence, and make the form of the deed the controlling factor only where there is this lack of evidence coupled with a meretricious cohabitation.

A possible way of reaching the result in the *Creasman* case, i.e., giving the property to the grantee, would be to include the meretricious spouse in that class of persons who are the natural objects of the purchaser's bounty. While it may be more likely that a man would intend to make a gift to his mistress rather than to make her a trustee, see 3 SCOTT, TRUSTS 2260 (1939), the weight of authority is *contra. Orth v. Wood,* 354 Pa. 122, 47 A. 2d 140 (1946); *Lufkin v. Jakeman,* 188 Mass. 528, 74 N.E. 933 (1905); *McDonald v. Carr,* 150 Ill. 204, 37 N.E. 225 (1894). There is also authority, supported by Washington cases, to the effect that the "natural object of bounty" exception obtains only where there is a "natural, moral, or legal obligation" to provide for the grantee. *Scott v. Currie, supra; Adley v. Pletcher,* 55 Wash. 82, 104 Pac. 167 (1909); 1 PERRY, TRUSTS (7th Ed. 1929) § 143. Furthermore, making the mistress the natural object of the purchaser's bounty might lead to inequitable results if the mistress were to die intestate. Although the husband takes a share of the separate property of his wife, RCW 11.04.020 [RRS § 1341; PPC § 199-1]; RCW 11.04.030 [RRS § 1364; PPC § 200-1], he would have no rights in the property of his mistress, even though this property may have been his home. As indicated in the dissenting opinion in *Creasman v. Boyle,* it hardly seems natural that a man would intend to make a gift of his dwelling house to his mistress, so that her heirs would take the property, to the exclusion of himself.

Retention of the exception of the *Creasman* case seems undesirable and unnecessary. Even if the normal rule of resulting trusts is presumed, and the meretricious wife is dead, RCW 5.60.030 will not bar her heirs from rebutting the presumption where it appears a gift was intended, or where the circumstances, i.e., the parties holding themselves out as husband and wife, show the purchaser intended the meretricious spouse should have some, but not all of the property.

ERNEST M. MURRAY

Divorce Decree—Procedure to Invoke Jurisdiction to Modify. *H* obtained a default divorce decree under which *W* was given custody of two minor children and *H* was granted reasonable visitation privileges. Later *H* remarried and established residence in Montana, and, in order to enable the children to visit him there, filed a motion and affidavit for an order that *W* show cause why the decree should not be modified. The show cause order was granted, but meanwhile *W,* in an original application in the Supreme Court, requested a writ of prohibition restraining the Superior Court from

modifying. She contended that Superior Court jurisdiction to modify cannot be invoked by a motion and affidavit. *Held:* Writ granted. RCW 26.08.170 [REM. SUPP. 1949 § 997-17] (formerly RRS § 995-3; PPC § 7511-3) provides that "upon filing of a properly verified petition . . . the Superior Court . . . shall have full and complete jurisdiction of the cause." *State* ex rel. *Edwards v. Superior Court,* 37 Wn. 2d 8, 221 P. 2d 518 (1950). The decision apparently implies that filing a petition is the *only* effective procedure.

This is a surprising result. The usual modern view is that there is no substantial difference between a petition and a written motion. In the language of *Gibbs v. Ewing,* 94 Fla. 236, 113 So. 730 (1927), "There are no precise boundaries between motions and petitions. The latter merely amount to motions in writing." In Washington it was early recognized that the substance and not the form of a pleading determines its character and effect. In *Baer v. LeBeck,* 126 Wash. 576, 219 Pac. 22 (1923), the court said, "It is true that the portion of the application was at the heading termed a motion but it contains allegations which make it in substance a petition." In re *Force,* 113 Wash. 151, 193 Pac. 698 (1920) is to the same effect. The court in the *Force* case found "no merit" in a contention that a motion was improper procedure when a statute called for a petition, and later remarked in *Harju v. Anderson,* 125 Wash. 161, 215 Pac. 327 (1923), that the pleading in the *Force* case was titled a motion but "in substance and fact was a petition." More recently the court held that a pleading, though titled a motion, would be treated as a petition to insure a hearing on the merits. *Valley Iron Works Inc. v. Independent Bakery Inc.,* 171 Wash. 349, 17 P. 2d 898 (1933). One court has reached a result exactly contrary to that of the instant case. In *Bishop v. Bishop,* 238 Ky. 702, 38 S.W. 2d 657 (1931), it was held that a motion to modify the custody provisions of a divorce decree satisfies a statute requiring that a petition be filed.

The instant case is also difficult to reconcile with *McClelland v. McClelland,* 163 Wash. 59, 299 Pac. 984 (1931), in which the Court observed in another context that the procedural requirements of REM. REV. STAT. § 995-3, *supra,* do not apply where the application for modification is filed in the same county in which the divorce decree was rendered. The instant case relies on this statute even though all the litigation took place in the same county.

The decision becomes more confusing when it is noted that a writ of prohibition is an extraordinary remedy which should not lie unless the trial court is wholly without jurisdiction. See *State* ex rel. *New York Casualty Co. v. Superior Court,* 31 Wn. 2d 834, 199 P. 2d 581 (1948).

The instant case, of course, makes little impression on Washington law, but reflects an unusually strict view of procedure.

RAYMOND H. SIDERIUS

Probate—Administration of an Estate Under Absentee Statute. A bank was appointed guardian of *N*'s estate in 1941, *N* having been adjudged incompetent. In 1942, *N* disappeared, and was not heard from for over seven years. *P,* on behalf of *N*'s heirs, petitioned the probate court for appointment as administrator of *N*'s estate. The appointment was made, and the bank appealed. *Held:* Reversed. Where there is neither allegation nor evidence sufficient to give the probate court jurisdiction to determine that the missing man is dead, his heirs are relegated to the absentee statutes for provisional distribution. In re *Nelson's Estate,* 37 Wn. 2d 397, 224 P. 2d 347 (1951).

The Washington absentee statute, RCW 11.80.010 *et seq.* [RRS § 1715-1 *et seq.,* PPC § 191-1 *et seq.*], provides for provisional distribution of an absentee's estate after