Washington Law Review

Volume 33
Issue 2 *Washington Case Law—1957*

7-1-1958

Community Property

James V. O'Conner

ATTORNEY AND CLIENT

Wilful Failure to Pay Income Taxes as Grounds for Disbarment. The court in *In re Seijas,* 151 Wash. Dec. 350, 318 P.2d 961 (1957), held that an attorney convicted under section 145(b) of the Internal Revenue Code of 1939 could be disbarred by the summary procedure provided for in Rule 18, Washington Supreme Court Rules for Discipline of Attorneys, 34A Wn.2d.

Section 145(b) of the Internal Revenue Code provides that "Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or default any tax imposed by this chapter or the payment thereof, shall... be guilty of a felony...." Rule 18 of Rules for Discipline of Attorneys, 34A Wn.2d, provides that "... where a final conviction involves moral turpitude, the board of governors may, by a summary proceeding ... recommend to the supreme court the disbarment of the member so convicted."

The Washington court did not attempt to make an independent determination of whether a "wilful" failure to pay income taxes was an offense involving moral turpitude, but considered the federal cases as controlling on this issue. In addition, following the lead of the federal courts, the Washington court confined its inquiry to the record of conviction, consisting of the indictment, plea, verdict and sentence. The court felt that *Tsueng Chu v. Cornell,* 247 F.2d 929 (9th Cir. 1957), fairly stated the federal rule. In the *Tsueng Chu* case the court held that a violation of section 145(b) of the revenue code is an offense involving moral turpitude, and a conviction under 145(b) necessitates a finding that the accused has fraudulently attempted to evade the payment of income tax.

Since the defendant in the present case was charged and convicted of wilfully filing a fraudulent return, the *Tsueng Chu* case is precisely in point. Thus the Washington court, by accepting the *Tsueng Chu v. Cornell* decision, held that a conviction under 145(b) of the Internal Revenue Code of 1939 involved moral turpitude and the use of the summary procedure by the board of governors was proper.

COMMUNITY PROPERTY

Mutual Observance by Spouses of Separate Property Agreements. In *Kolmorgan v. Schaller,*[1] the Washington supreme court set up two distinct tests to prove the validity of a separate property agreement between a husband and wife making the earnings of one spouse his or her separate property. The court said "... the proponents of such agreements must establish by *clear and convincing evidence:* (1) the existence of the agreement... and (2) that the agreement has been *mutually observed* by the spouses...."[2]

Mr. Scholler was unemployed from August, 1953 to March, 1956. During this period Mrs. Scholler's income was used to pay the community expenses and obligations. On January 13, 1954, Mr. and Mrs. Scholler filed a written separate property agreement with the

[1] 151 Wash. Dec. 79, 316 P.2d 111 (1957).
[2] 151 Wash. Dec. at 82, 316 P.2d at 113.

county auditor of Thurston County. The present action was initiated by the plaintiff to garnish Mrs. Scholler's wages in satisfaction of a judgment against the community and Mr. Scholler. The debt upon which the judgment was obtained was incurred by Mr. Scholler in 1955, over a year subsequent to the filing of the separate property agreement.

Although the existence of the separate property agreement was easily proved, as it was a written agreement filed with the county auditor, the court found that the agreement had not been mutually observed by the spouses (the wife's earnings had been used to pay community expenses and obligations for a period of almost three years) and, therefore, held the agreement invalid.

A property agreement determining the immediate status of personal property between a husband and wife is a non-statutory creature. RCW 26.16.050 provides for conveyances of real property between spouses, and RCW 26.16.120 provides a method of disposing of community property to take effect upon the death of one of the spouses, but there are no statutes providing for the immediate disposition of property by agreement of the spouses.

Although there is no statutory provision so providing, the Washington court has upheld agreements, oral or written, between a husband and wife making what would normally be community property into the separate property of one of the spouses, or what would ordinarily be separate property of one of the spouses, community property.[3] These agreements have been held valid even though they apply to property to be acquired in the future, as well as to property presently owned.[4]

The *Kolmorgan* case is the first one in which the court has expressly set up two distinct tests for proving the validity of a separate property agreement. In prior cases the court has directed its attention to evidence proving the existence or nonexistence of a separate property agreement and only indirectly, if at all, mentioned the need for mutual observance by the spouses.

In *Dobbins v. Dexter Horton & Co.*[5] the court upheld an oral agreement between a husband and wife to the effect that the wife's earnings should be her separate property. The court said that since the agreement between the husband and wife was entered into long before

[3] Union Securities Co. v. Smith, 93 Wash. 115, 160 Pac. 304 (1916); Volz v. Zang, 113 Wash. 378, 194 Pac. 409 (1920).

[4] *Ibid.*

[5] 62 Wash. 423, 113 Pac. 1088 (1911).

the creditor had any interest, and since the wife's earnings had been treated as her separate property by the husband and wife, they were, therefore, her separate property.

In 1916, in *Union Securities Co. v. Smith*,[6] the rights of a judgment creditor of the community were involved, as in the *Kolmoran* case. Testimony established the existence and observance of an oral agreement that separate property and earnings of the spouses would remain separate. The court spent considerable time discussing the evidence and testimony proving the existence of the agreement. The court then said, "This evidence fairly establishes the agreement and shows that, in the main, it had been continuously acted upon.... Such agreements, made after marriage and mutually observed, are valid."[7]

In the only other case[8] where the court expressly referred to the necessity of mutual observance to the validity of separate property agreements the court was quoting from the *Union Securities Co.* case in dicta.

In stating the test of mutual observance in the *Kolmorgan* case the court cited the above cases, all of which involve the rights of creditors in property subject to a property agreement between husband and wife. The court also cited *Gates v. Gates*,[9] a case in which only the rights of the husband and wife were concerned.

In the *Gates* case the only mention of any observance of a separate property agreement was in the statement of facts where the court said that the earnings of the wife had always been treated as her separate property. In the opinion the court discussed only the existence of the agreement and, since no rights of creditors were involved, held that the undisputed testimony of the husband and wife as to the agreement was sufficient to uphold the wife's earnings as her separate property.

A review of cases involving separate property agreements shows the court has taken into consideration the observance of the agreement at least as an aid to determining the existence of the agreement. But the court has never before made mutual observance an express test of the validity of such an agreement.

The question now is, will the court continue to set up mutual observance as the test of the validity of a separate agreement? And if it does, what will satisfy this test?

In the *Kolmorgan* case the court may have felt that from the facts

[6] 93 Wash. 115, 160 Pac. 304 (1916).
[7] 93 Wash. at 118, 160 Pac. at 305.
[8] Volz v. Zang, 113 Wash. 378, 194 Pac. 409 (1920).
[9] 78 Wash. 262, 138 Pac. 886 (1914).

it would not be equitable to enforce the agreement. The agreement was made at a time when the husband was unemployed and the prospects of employment were very slight, thus leaving the wife's income as the sole support of the community. But if this had been the case, the court could have followed the lead of the trial court, which held that the agreement, as written, applied only to present income and not to future-acquired earnings, and that, therefore, any income received subsequent to the date of the agreement was community property and subject to garnishment by the plaintiff.

What is the test of mutual observance of such an agreement? In the *Kolmorgan* case, the court found non-observance because the wife's income was used to pay for the community expenses. Thus, the court used a relation back test. They looked at how the earnings were used and then said the agreement was invalid. How good a test is this?

Under our law the character of property as community or separate is determined at the time of acquisition. If this is true, the earnings of the wife took character as separate or community property at the time she received them. What she did with those earnings thereafter should have had no bearing on the nature of the income at the moment it was received. True, how she disposed of her income may have changed the character of these earnings from separate to community by way of gift, commingling or later agreement, but this did not make these earnings community property when received, nor should it have determined the character of income to be received in the future.

If the court is going to test the character of property received under a separate property agreement by the way it is used, just how much of this property must be used for community purposes before the court will say the agreement has not been mutually observed? All of it, half of it, or what portion of it? Would using all the income from one pay period for community expenses therefore make all future paychecks community property, or must there be a showing that all the paychecks over a certain period of time are used to pay community expenses?

These, and similar questions, are going to be difficult ones to answer in the enforcement of the test of mutual observance.

Even if mutual observance should be a desirable test it is questionable whether it was proper to apply it in the present case. It seems the test should be directed towards voluntary observance or non-observance by the spouses. In this case it is doubtful if the wife had any choice as to whether she should pay community expenses with

her separate income. The expenses paid by the wife were grocery bills, utilities, clothing and house payments. All these expenses are in the nature of "family expenses" and create three-way liability (the husband separately, the wife separately and the community.)[10] Therefore, the wife could have been forced to pay these community expenses and there was no voluntary non-observance of the agreement by the spouses.

JAMES V. O'CONNER

Community Property—Property Acquired During Meretricious Relationship. In *West v. Knowles,* 50 Wn.2d 311, 311 P.2d 689 (1957), the Washington court affirmed its position that property acquired during a meretricious relationship "belongs to the original owner, in the absence of an overt gift or contract regarding it."

Plaintiff and defendant lived in a meretricious relationship for ten years, during which time they held themselves out as husband and wife. They separated in 1955 and this action was commenced to fix their property rights. The supreme court affirmed the judgment of the trial court of tracing the property to one or the other instead of awarding the properties to the parties in whom the title stood.

Judge Finley, in a concurring opinion, disagreed with the reasoning of the majority. He thought there was a fair distribution of property in this case, but that the method of distribution was incorrect.

Judge Finley believes that the property of parties to a meretricious relationship should be distributed on a fair and equitable basis. "A fair and equitable distribution of property does not imply an accounting operation with the precision and delicacy of a surgeon's scalpel. It merely connotes a reasonable and rough approximation and appraisal of earnings and other factors, and a division of property that will in a general way be reasonable, fair, and equitable by the standards of just, tolerant, and understanding individuals."

In cases of acquisition during meretricious relationship, ownership by the present rule may be determined by "tracing," but it would not be too surprising to find the court adopting the reasoning of Judge Finley where the distribution of property under the present method seems grossly unfair.

Community Property—Liability for Wife's Business Activities. In *Colagrossi v. Hendrickson,* 50 Wn.2d 266, 310 P.2d 1072 (1957), the court held the community liable on a note given by the wife in connection with her business.

Mr. and Mrs. Nadreau had been married for twenty-five years, living together as husband and wife. Mrs. Nadreau had been engaged in the real estate business since 1937. Mr. Nadreau knew of, but took no part in, his wife's business activities. Mrs. Nadreau's earnings were used to pay for her personal expenses, i.e., clothing, food, etc., and for one-half of the payments on the family home.

In holding the community liable on the note the court stated that in lieu of a separate property agreement to the contrary (they found none here) money derived from a wife's personal services, earned during coverture while living with her husband, is community property.

The court said that community liability may result from a wife's obligations in two ways: (1) under the "family expense statute" (RCW 26.20.010) which creates three-way liability (the husband separately, the wife separately and the community); and (2) from transactions for a community purpose, either authorized or ratified by the

[10] RCW 26.20.010.

husband, or the community character of which he has estopped himself from denying.

It was held that this case came within (2) above as Mr. Nadreau had permitted his wife to engage in business for nineteen years and, by accepting the benefits of the community from the profits earned, he could not now repudiate that which was against his interest.

The court also stated that the possible individual liability of the husband was not within the scope of the pleadings and then cited *Lucci v. Lucci*, 2 Wn.2d 624, 99 P.2d 393 (1940). The court there held the husband separately liable in addition to the community (the wife, as manager, had borrowed money to operate a grocery store for the benefit of the community). Perhaps this is an indication that in this case the court would have held Mr. Nadreau separately liable also if he had been brought within the scope of the pleading, or perhaps the court was only ready to clarify its position in the *Lucci* case. However, in a similar case it seems advisable to bring the husband within the scope of the pleadings with the hope of holding the husband separately liable also.

Liability of the Community for Intentional Torts of the Husband. In *Smith v. Retallick*, 48 Wn.2d 360, 293 P.2d 745 (1956), the defendant husband struck the plaintiff during a heated discussion which was caused by a near collision of their automobiles. The husband was driving alone to visit a friend who was then employed at a service station some distance from the husband's home.

The court held that while the husband committed a battery, the plaintiff could not recover damages from the community. The court stated that community liability for the torts of a spouse is predicated upon the doctrine of respondeat superior. It did not make an independent determination as to whether the husband was acting as an agent for the community in the present case, but relied upon the prior decision of *Newbury v. Remington*, 184 Wash. 665, 52 P.2d 312 (1935), to reach its conclusion because the facts of the prior case were identical with those in the present situation. Since the court in the present case limits its discussion to this peculiar factual situation, one is unsure of the extent to which the court will, in the future, find community liability for the intentional torts of the husband in other situations.

For further discussion of this problem see: Pruzan, *Community Property and Tort Liability in Washington*, 23 WASH. L. REV. 259 (1948); *LaFramboise v. Schmidt*, 42 Wn.2d 198, 254 P.2d 485 (1953); *McHenry v. Short*, 29 Wn.2d 263, 186 P.2d 900 (1947).

CONSTITUTIONAL LAW

Constitutional Law—Dams and Waterpower—Eminent Domain—Interstate Commerce—Municipal Corporations—Res Judicata—State Officers—The Cowlitz Dam Case, *Tacoma v. Taxpayers*, 49 Wn.2d 781, 307 P.2d 567 (1957). The case under examination is the culmination of nearly ten years of struggle, which now has been carried to the Supreme Court of the United States. Briefly, the salient events are these: In 1948 Tacoma filed with the Federal Power Commission (FPC) its declaration of intention to build two power dams on the Cowlitz River in Lewis County, one dam near Mayfield and the other near Mossyrock. The FPC granted a temporary license, the