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No. 80925-9

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SUPREME COURT
OF THE STATE OF WASHINGTON

ARTHUR R. GILROY,

Respondent,

v.

ALICE MONTANO-GUERRERO, as successor Personal
Representative of the ESTATE OF JEANNETTE L. BORGHI,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

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I. ISSUES ON REVIEW

1. Whether accepting title to property in both spouses' names as "husband and wife" gives rise to a presumption that the property is community property?

2. Whether using property titled in both spouses' names as "husband and wife," as security for a community debt for improvements to the property that is thereafter paid by the community from community assets and income during the marriage, is direct and positive evidence of a spouse's intent that the property be community property?

II. STATEMENT OF THE CASE

Jeanette and Robert Borghi were married on March 29, 1975. (CP 75) On June 12, 1975, the Cedarview Development Co. executed a Special Warranty Deed to "Robert G. & Jeannette L. Borghi, husband and wife" to the property at issue in this appeal. (CP 75, 80) The deed was recorded on August 13, 1979. (CP 82) The deed states that it was given in fulfillment of a real estate contract dated March 16, 1966. (CP 80) The real estate contract was not recorded, and no copy of the contract has been found. (CP 22) The record contains no evidence of the timing or frequency of the payments under the contract.

Mr. and Mrs. Borghi resided on the property as their primary residence from 1975 until 1990. (CP 22-23) In August 1979, Mr. and Mrs. Borghi used the property to secure a mortgage with Washington Mutual Savings Bank. (CP 22) They used the mortgage to purchase a mobile home to put on the property. (CP 22) Mr. and Mrs. Borghi made the payments for the mortgage from their joint bank account. (CP 22) A satisfaction of the mortgage was recorded in July 1999. (CP 22)

Mrs. Borghi died intestate on June 25, 2005. (CP 11-12) Her surviving heirs were Mr. Borghi and Arthur Gilroy, her son from a previous marriage. (CP 12) Mr. Borghi became the personal representative. (CP 21) He obtained a title report which shows that the title of the land is vested in "Robert G. Borghi ... as his separate estate and the Heirs and Devisees of Jeanette L. Borghi, deceased." (CP 22-23, 36) Mr. Borghi filed a petition for declaratory judgment to determine title to the real property. (CP 21) The probate court ruled that the real property was the community property of Mr. and Mrs. Borghi and would pass to Mr. Borghi under intestate succession. (CP 150-55)

Mr. Gilroy appealed, seeking a declaration that the real property was Mrs. Borghi's separate property. (CP 144) Division

One held that the evidence led “to the conclusion that Mrs. Borghi intended the deed [to the real estate] to reflect a gift of her separate property to the community,” consistent with the reasoning of *Hurd v. Hurd*, 69 Wn. App. 38, 848 P.2d 185, *rev. denied*, 122 Wn.2d 1020, 863 P.2d 1353 (1993). *Estate of Borghi*, 141 Wn. App. 294, 304, ¶ 18, 169 P.3d 847 (2007), *rev. granted*, 187 P.3d 751 (2008). However, Division One held that it was “constrained” by a departmental decision of this Court, *Estate of Deschamps*, 77 Wash. 514, 137 P. 1009 (1914), to “reach the opposite conclusion” and “reluctantly conclude” that the property was Mrs. Borghi’s separate property. *Borghi*, 141 Wn. App. at 304, ¶ 18. This Court accepted review of Division One’s published decision.

III. SUPPLEMENTAL ARGUMENT

A. A Community Titling Presumption Is Consistent With All Relevant Washington Law.

In its decision in this case, Division One abrogated its earlier decision in *Hurd* that a “spouse’s use of his or her separate funds to purchase property in the names of both spouses, absent any other explanation permits a presumption that the purchase or transaction was a gift to the community.” *Estate of Borghi*, 141 Wn. App. 294, 300-01, ¶¶ 11, 13, 169 P.3d 847 (2007)(*quoting*

Hurd, 69 Wn. App. at 51). This Court should now confirm that the community titling presumption reflected in *Hurd* is the law of this state. Specifically, this Court should hold that real property purchased by means of a real estate contract executed before marriage by the purchasing spouse should be presumed to be community property when a fulfillment deed issued after the marriage names both spouses, absent clear and convincing proof to overcome such a presumption.

In *Hurd*, the husband owned as his separate property vendor's rights under a real estate contract for the sale of real property. When the buyers were unable to fulfill the real estate contract, the husband directed the buyers to deed the property back to him in the names of both the husband and wife. The trial court concluded that regardless of title, the real property was the husband's separate property. Division One reversed, enunciating the principle that a "spouse's use of his or her separate funds to purchase property in the names of both spouses, absent any other explanation permits a presumption that the purchase or transaction was intended as a gift to the community." *Hurd*, 69 Wn. App. at 51.

This community titling presumption is consistent with long-established law in this state that spouses may change separate into

community property as long as there is some writing evidencing their intent. See **Volz v. Zang**, 113 Wash. 378, 381-84, 194 P.409 (1920); see also RCW 26.16.120. A spouse's decision to accept title to property that would otherwise be separate as community property is evidence of such an intent to change separate to community property.

Further, a presumption of community property based on titling is consistent with long-established law that a spouse's use of his or her separate funds to purchase property in the name of the other, absent any other explanation, permits a presumption that the transaction was intended as a gift. **Scott v. Currie**, 7 Wn.2d 301, 308-09, 109 P.2d 526 (1941). This separate property titling presumption, where a spouse's purchase of property in the other spouse's name is presumed to be a gift to the grantee spouse, has been the law in this state for nearly one hundred years. See **Denny v. Schwabacher**, 54 Wash. 689, 692, 104 P. 137 (1909) ("Where the consideration for a conveyance of property is paid from the separate funds of one spouse and the property is conveyed to the other, a presumption of a gift rather than a trust arises, and this presumption can only be overthrown and the trust relation

established by evidence that is clear, cogent, and convincing”) (citing Pomeroy’s Eq. Jur. §1041).

There is no reason why a presumption of a gift of separate property should arise when property is placed in the name of one spouse, but not when it is placed in the name of both spouses. Confirming the community titling presumption is consistent with our laws “favor[ing] characterizing property as community instead of as separate property unless there is clearly no question of its character.” *Brewer v. Brewer*, 137 Wn.2d 756, 766-67, 976 P.2d 102 (1999). This Court’s confirmation of the community titling presumption would also be consistent with the rule in a majority of states whose laws presume that when separate property is used to purchase property taken into joint title, or when separate property is transferred into the joint names of both spouses, the property has been gifted to the marital estate. See *Steinmann v. Steinmann*, 749 N.W.2d 145, 160, ¶ 51 (2008) (citing Brett R. Turner, *Equitable Distribution of Property*, § 5:43, at 476 (3d ed. 2005) (“The joint title gift presumption is presently recognized in a majority of American jurisdictions.”)).

Finally, the presumption that the Borghis owned the real property as community property because it was deeded to them as

“husband and wife” is also consistent with our general law related to deeds. As this Court has stated, “a deed is presumed to be that which it purports to be, and the burden is on the one asserting otherwise. When a deed sufficient to vest title is executed and delivered, the law raises the presumption of an intent to pass the title in accordance with its terms, and the burden rests on the one who avers a different intention.” *Makinen v. George*, 19 Wn.2d 340, 350, 142 P.2d 910 (1943); see also *McCoy v. Lowrie*, 44 Wn.2d 483, 488, 268 P.2d 1003 (1954); *Moore v. Gillingham*, 22 Wn.2d 655, 663-64, 157 P.2d 598 (1945).

A community titling presumption is consistent with all relevant Washington law. This Court should confirm that titling property in both spouses’ names as “husband and wife” gives rise to a presumption that the property is community property.

B. A Community Titling Presumption Is Not Inconsistent With This Court’s 1914 Departmental Decision In *Deschamps*.

Division One relied on a comment in *Washington Practice*, that *Hurd* was inconsistent with *Estate of Deschamps*, 77 Wash. 514, 137 P. 1009 (1914), and was “poorly decided,” to abrogate its earlier decision. *Borghi*, 141 Wn. App. at 301, ¶ 13 (citing Kenneth W. Weber, 19 *Washington Practice: Family and Community*

Property Law, § 10.7, at 142 n. 4). But the ***Deschamps*** Court did not address the community titling presumption. In fact, the result in ***Deschamps*** turned not on any particular rule of law, but on the weight of the evidence in that case.

In ***Deschamps***, neither the probate court nor a Department of this Court was persuaded that the “true intent and purpose of the parties” was to convert the wife’s separate property to community property. 77 Wash. at 518. This conclusion was supported by the fact that the wife in ***Deschamps*** left a will that devised the disputed real property to her daughter of a former marriage and specifically excluded the husband from receiving the property, the husband provided no support for his testimony that he had made payments towards the real property’s mortgage, and the “conduct of the husband after the death of the wife is such as to warrant a belief that he did not at the time regard the property as his own,” because the wife’s daughter, not the husband, made all mortgage and tax payments on the property after the wife’s death. ***Deschamps***, 77 Wash. at 514-16.

Here, to the contrary, both the probate court and Division One correctly determined that the evidence supported the conclusion that the wife intended to gift the real property to the

community. The probate court found that the intent of the parties in accepting the deed to the property in both names was a "modification" of the real estate contract the wife had executed before marriage (Finding of Fact (FF) 18, CP 153), and that the parties' acceptance of the deed in both their names was a "'change by deed' in the character of the property converting it from separate property of one spouse to community property of both spouses." (FF 20, CP 153) The probate court found that the wife's intent to change the character of the real property can be "inferred from such conduct as conveying or mortgaging the property" (FF 22, CP 154); the parties had used the property as security for a mortgage on which they were both liable, and the community had made "all payments due under the mortgage." (FF 10, 24, CP 152, 154)

Division One agreed that the evidence "leads us to the conclusion that Mrs. Borghi intended the deed to reflect a gift of her separate property to the community." 141 Wn. App. at 304, ¶ 18. That being so, nothing in *Deschamps* prevented affirming the probate court's decision based on this evidence. Even if there was no community titling presumption, this direct and positive evidence was sufficient to overcome any presumption to the contrary under *Deschamps*. In fact, Division One went far beyond *Deschamps* in

creating a "summary" 141 Wn. App. at 302, ¶ 14, and in effect irrebuttable, presumption that separate property can *never* be converted to community property by gift deed.

In arguing that the community titling presumption should be rejected, the author of *Washington Practice* also asserted that such a presumption had never previously been adopted. 19 *Washington Practice*, § 10.7, at 142 n. 4. While this may be technically true in Washington, several other jurisdictions had adopted similar presumptions by the time the *Hurd* decision came down in 1993. See e.g. *Hartzell v. Hartzell*, 623 So.2d 323, 325 (Ala. Ct. App. 1993); *Lewis v. Lewis*, 785 P.2d 550, 555 (Alaska 1990); *Husband T.N.S. v. Wife A.M.S.*, 407 A.2d 1045, 1047-48 (Del. 1979); *Robertson v. Robertson*, 593 So.2d 491 (Fla. 1991); *Conrad v. Bowers*, 533 S.W.2d 614, 1620, fn. 5 (Mo. Ct. App. 1975); *Pascarella v. Pascarella*, 398 A.2d 921, 924 (N.J. Super. Ct. App. Div. 1979); *Madden v. Madden*, 486 A.2d 401, 404-05 (Pa. Super. Ct. 1984); *Quinn v. Quinn*, 512 A.2d 848, 852 (R.I. 1986); *Batson v. Batson*, 769 S.W.2d 849, 858 (Tenn. Ct. App. 1988).

Finally, *Hurd* was not "improperly decided." *Borghini*, 141 Wn. App. at 301-02, ¶ 13. In fact, as Division One recognized, the

community titling presumption “appropriately protects separate property from inadvertent changes in character but allows for gifts by deed” by providing for the community titling presumption to be overcome by “proof that community benefit was not intended, such as evidence of accommodation of a mortgagor, duress or deception, or an unsolicited act of a third party in preparing the document.” *Borghi*, 141 Wn. App. at 303, ¶ 16. Such a presumption protects against “inadvertence or avarice,” while allowing a separate property owner to demonstrate a gift to the community through acceptance of a deed to the community. *Borghi*, 141 Wn. App. at 303, ¶ 16. A community titling presumption is a logical outgrowth of our laws that allow parties to change separate property into community property if their intent is evidenced in writing, and the long held presumption that a separate property owner who chooses to re-title property in the name of the other spouse is presumed to have intended a gift to the other spouse. See *Hurd*, 69 Wn. App. at 51.

A community titling presumption is not inconsistent with this Court’s 1914 departmental decision in *Deschamps*. This Court should confirm that titling property in both spouses’ names as

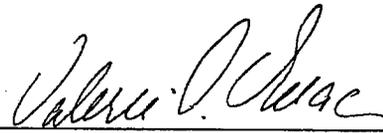
"husband and wife" gives rise to a presumption that the property is community property.

IV. CONCLUSION

This Court should hold that the community titling presumption is the law of this state, reverse the Court of Appeals, and affirm the trial court's decision quieting title in Mr. Borghi's estate.

DATED this 15th day of August, 2008.

EDWARDS, SIEH, SMITH
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DECLARATION OF SERVICE

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The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

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BY RONALD R. CARPENTER

CLERK

That on August 15, 2008, I arranged for service of the foregoing Supplemental Brief of Petitioner to the court and the parties to this action as follows:

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DATED at Seattle, Washington this 15th day of August, 2008.


Tara D. Friesen