

NO. 42823-7-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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In re the Matter of

Jimmy F. Campbell and Christina Campbell, Husband and Wife,

Appellant,

vs.

Jean A. Davolt, as Guardian for Joseph Duane Bailey,

Respondents.

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BRIEF OF APPELLANT

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Jimmy F. Campbell  
Christina L. Campbell  
135 Shenandoah Drive  
Silverlake, WA 98645  
(360) 751-5001

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Secondary Authority

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## I. INTRODUCTION

This is an appeal from an Order of Dismissal following a Motion for Summary Judgment. The appellants, Jimmy F. and Christina Campbell, (hereinafter appellants) had appeared, responded and argued facts sufficient to overcome the Summary Judgment Motion brought by Jean A. Davolt, as Guardian for Joseph D. Bailey (hereinafter respondents).

The procedural history is as follows: On or about January 13, 2011, the respondents filed a Complaint to Quiet Title. The appellants responded on or about January 27, 2011. After discovery, on or about June 16, 2011, the respondents filed their first Motion for Summary Judgment. Appellants responded on or about July 15, 2011, with factual declarations supporting the denial of a Motion for Summary Judgment. On or about August 8, 2011, the Court entered a partial Summary Judgment.

Thereafter, on or about August 31, 2011, the respondents filed a second Motion for Summary Judgment. On or about October 3, 2011, the respondents again filed factual declarations. On or about October 7, 2011, after hearing, the Court granted respondent's Motion for Summary

Judgment. The appellants timely filed appealed here.

## II. ASSIGNMENT OF ERROR

### Assignment of Error No. 1.

The trial court erred in granting respondent's Motion for Summary Judgment quieting title in the name of Jean A. Davolt, as Guardian for Joseph Bailey. CP 31.

### Assignment of Error No. 2.

The trial court erred in setting aside that Quit Claim Deed dated April 12, 1999, and recorded August 2, 2001, in Cowlitz County, State of Washington. CP 31.

### Assignment of Error No. 3.

The trial court erred in setting aside and declaring void said Deed, based on said Deed pertaining to community property, but lacking the signatures and acknowledgments of both spouses, when the facts established that both spouses intended to transfer a half interest of said property, and did acts to affect said transfer. CP 31.

### Assignment of Error No. 4.

The trial court erred in quieting title to the plaintiff and against the defendants, and anyone claiming through the defendants, relative to said

Deed. CP 31.

**Assignment of Error No. 5.**

In that the facts admitted to the court were that respondent and his former wife, Mary Margaret Bailey, both intended to transfer a one-half interest in the property to appellants, the trial court erred in not granting appellants request to quiet title in them. CP 16, Page 5; CP 30, Page 3.

**III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Was the Quit Claim Deed, dated April 12, 1999, and recorded August 2, 2011, by independent acts of both parties to the Deed, a valid transfer of a one-half interest in said real property? (Assignment of Error Nos. 1 through 5).
2. Given the undisputed facts of this case, taken in the light most favorable to appellants, were the acts of the respondent and his former wife, Margaret Bailey, effective to transfer a one-half interest in said real property? (Assignment of Error Nos. 1 through 5).
3. Can the parties overcome the requirements of a signature and acknowledgment by acts sufficient to show an intent to transfer real property? (Assignment of Error Nos. 1 through

- 5).
4. Where an individual appears at an auditor's office and indicates a desire to sign, "whatever is necessary," to transfer real property, and does sign Excise Tax Affidavits and is instrumental in having a Deed recorded, is that Deed valid, such that the court should not thereafter set aside and declare it void? (Assignment of Error Nos. 1 through 5).
  5. Should the court here, given the undisputed facts, taken in the light most favorable to the appellants, have granted quiet title to appellants? (Assignment of Error Nos. 1 through 5).

#### **IV. STATEMENT OF THE CASE**

The mother of my former husband (co-appellant, Jimmy Campbell) was Mary Margaret Campbell. I loved my mother-in-law, and continued to love her when she married Joseph Duane Bailey, the respondent herein. (CP 16).

Mary Margaret and Duane purchased a home together at 2839 Florida Street, Longview, Washington. I visited there often. It was my understanding that the home was co-owned by both Mary Margaret and

Joseph Bailey. (CP 16).

In 1999, my mother-in-law informed me that she wanted me and her son (Jimmy Campbell) to have her half of the home as our inheritance. This gift was not my doing. I had not requested anything from my mother-in-law. She specifically told me that she wanted her half of the residence to go to me and her son, and not to the Baileys, who she claimed not to have much of a relationship with her. Upon her own free will and volition, she presented me with the Deed that she had signed April 12, 1999, attached hereto as Appendix A. She followed that up with a handwritten letter dated October 12, 1999, attached hereto as Appendix B. (CP 16).

I am not versed in the law. I believed that by the Deed and the note, she had gifted to me and her son her one-half interest in the residence. I didn't know there was anything I needed to do at the time. Therefore, I just hung onto these documents. (CP 16).

Mary Margaret Bailey became very ill in 2001. During the last three months of her life, while she was racked with pain, I slept on her floor and administered pain medication on a regular basis. I loved Mary Margaret Bailey and would not abandon her. She passed away on May 31,

2001. (CP 16).

In July 2001, I went to record the Deed. At that time, I was informed there was a Community Property Agreement. The Cowlitz County Auditor's office explained to me that in order to record the Deed, I would need approval from Duane. I went to Duane and he readily agreed. He knew that Jim Campbell and I were to have Mary Margaret's half of the property. He agreed to go with us to the Auditor's office. At the Auditor's office, he clearly told them that whatever documents need to be signed to give me and Jim Campbell one-half interest in the property, he wanted to sign. The Auditor's office provided us with the Real Estate Excise Tax Affidavit, and the Supplemental Tax Affidavit, of which Duane signed as agent and grantor, allowing the Deed to be recorded, giving me and Jim Campbell the one-half interest he knew Mary Margaret wanted us to have. It is my understanding, at that point, one-half interest of the property was perfected in the name of me and Jimmy Campbell. See Appendix C. (CP 16).

## V. ARGUMENT

**1. ASSIGNMENT OF ERROR NOS. 1-5: GIVEN THE FACTS AS SET FORTH, THE COURT SHOULD NOT HAVE GRANTED SUMMARY JUDGMENT TO RESPONDENTS, BUT SHOULD HAVE GRANTED SUMMARY JUDGMENT TO APPELLANTS.**

Mary Margaret Bailey wanted me and Jim Campbell (her son) to have her one-half interest in the home they owned at 2839 Florid Street, Longview, Washington. It was her intent to gift us that one-half interest. She expressed that intent verbally and in writing, by both a Deed to Jimmy and I, as well as a handwritten note. Duane Bailey joined in that gift when he agreed to accompany us to the Auditor's office, agreed to the recording of the Deed, and acknowledged that intent by signing a Real Estate Excise Tax Affidavit under penalty of perjury, and a Real Estate Excise Tax Supplemental Statement, to me and Jimmy. If there was a Community Property Agreement, wouldn't it have been modified by agreement and conduct of the parties? Can't both parties to a Community Property Agreement separately agree to gift one-half interest in real estate?

I cannot afford an attorney to represent me in this matter. From a consultation I have been advised that I need to respond to Mr. Blinks' argument. I ask the court to be aware of the law in the State of Washington, as I do not believe Mr. Blinks will accurately present it to the court. I appreciate that Mr. Blinks states,

“All facts are considered in the light most favorable to the nonmoving party, *Vallandingham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (citing *Atherton Condo Apartment Owners Ass'n Bd. Of Dirs. V.*

*Blume Dev. Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990)).”

As I understand it, what this means is that the court is to consider the facts most in favor of Jimmy and I. The facts most favorable to us is that Mary Margaret and Duane both consented and participated in executing a Deed of one-half interest of the property to us. These facts have not been challenged. Therefore, they should be accepted as true and correct.

Mr. Blinks cites a statute, but no cases, to support his argument. The statute provides that a party to a marriage cannot sell real property, “without the other spouse or other domestic partner joining in the execution of the Deed ...” Mr. Blinks points out that the Deed does not contain the signature of Mr. Bailey, nor does it contain his acknowledgment. That is true. However, the Excise Tax Affidavit and Supplemental Excise Tax Statement both contain his signature and acknowledgment under penalty of perjury, acknowledging the gift of one-half of the property to me and Jimmy Campbell. I have again attached those documents, the same documents I attached to my original Declaration. These documents provide proof of the intent of both Mary Margaret and Duane to transfer the property.

After my consultation with an attorney, he did some research on the computer and gave me the case of *Higgins v. Stafford*, 125 Wn.2d 160, 866 P.2d 31 (Wash 1994). He indicated that I should point out to the judge that at the bottom of Page 4 and top of Page 5, the law is that the parties can partially rescind and alter a Community Property Agreement. That is what happened here. As I indicated in my first Declaration back in 2001, when Jimmy, Duane and I went to the Auditor's office, it was Duane's intent and desire that Jimmy and I have Mary Margaret's one-half interest in the Florid Street property. Duane indicated he would sign any documents necessary to effect that transfer. The Auditor's office provided him with an Excise Tax Affidavit and a Supplemental Excise Tax Statement, both of which he signed. It was Duane's intent to grant Mary Margaret's one-half interest in the property to Jimmy and I. Duane took the necessary steps to effectuate that transfer. If he had a Community Property Agreement, it was modified by these later acts. There are no contrary facts, and these facts should be taken in the light most favorable to me and Jimmy.

I am on State Disability and cannot afford an attorney to represent me, let alone attorney's fees to Mrs. Davolt. Legal Aid wouldn't represent

me, they were too booked with cases. In the Appendix, you will find secondary authority given to me from an attorney from *Washington Practice: Family and Community Property Law*. I incorporate that legal authority into my Brief here. I ask for the Court of Appeals' help in this matter.

As I read this secondary legal authority, it is clear that Jimmy and I have a valid Deed for a one-half interest in the property located at 2839 Florida Street, Longview, Washington, especially in light of the foregoing cases regarding intent. In particular, it states that, "sometimes the writing will be in the form of a collateral document which does not mention the community property agreement, but the effect of which works as a modification." That is what happened here. Duane intended to transfer the property, and by aiding and recording the Deed, announced to the world that the property had, in fact, been transferred.

I am aware that property can be acquired without a Deed whatsoever. I was involved in a boundary line dispute with my neighbor. Ultimately, the neighbor was able to gain a portion of my property due to a fence line that didn't correspond with the legal description. If a party can acquire interest in property without a Deed at all, then certainly where the

parties take action to record a Deed, that action should be held as valid.

VI. CONCLUSION

I again ask the court to grant clear title, one-half to me and Jimmy Campbell, and the other half to Joseph Duane Bailey, under the Deed he consented and help to record on August 2, 2001. The facts are absolutely clear and undisputed that he consented to the Deed, that it was what he and Mary Margaret Bailey wanted, and a transfer of ownership was made. It would be a strange world indeed, if someone could transfer real estate, and then later file a document stating, "Kings X," that they didn't mean it and have that document override an agreed Deed. The stability of real estate transactions would be seriously jeopardized if such a rule were allowed.

Dated: April 19, 2012.

Respectfully Submitted,

  
CHRISTINA CAMPBELL

I, Jimmy Campbell, herein join in this Brief.

Respectfully Submitted,

  
JIMMY CAMPBELL

CERTIFICATE OF MAILING

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on April 19, 2012, I caused to be mailed upon those listed below, in the manner indicated therein, a true and correct copy of the Brief of Appellants.

Addressed to:

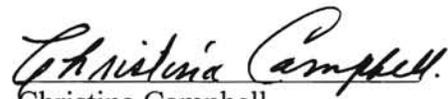
Delivered via:

Scott Edward Blinks  
Attorney at Law  
P.O. Box 867  
Chehalis, WA 98532

First class mail

Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

First class mail

  
Christina Campbell



I give my 1/2 half of Paul Estate  
to Jim H. Campbell & Christina L. Campbell  
Mary Margaret Bailey 10-12-99-

EXHIBIT

B

tabbies

PLEASE TYPE OR PRINT  
PLEASE SEE REVERSE

### REAL ESTATE EXCISE TAX AFFIDAVIT

CHAPTER 82.45 RCW - CHAPTER 458-61 WAC  
FOR USE AT COUNTY TREASURER'S OFFICE

This form is your receipt  
when stamped by cashier.

(Use Form No. 84-0001B for Reporting Transfers of Controlling Interest of Entity Ownership to the Department of Revenue)  
**THIS AFFIDAVIT WILL NOT BE ACCEPTED UNLESS ALL AREAS 1-7 ARE FULLY COMPLETED**

1 SELLER GRANTOR	Name <u>Wm. H. Bailey</u>	2 BUYER GRANTEE	Name <u>Jim &amp; Christina L. Campbell</u>
	Street <u>2839 Florida St.</u>		Street <u>1618 N. 3rd</u>
	City/State/Zip <u>Spokane, WA. 99206</u>		City/State/Zip <u>Spokane, WA. 99206</u>

3 ADDRESS TO SEND ALL PROPERTY TAX RELATED CORRESPONDENCE	ALL TAX PARCEL NUMBERS	COUNTY TREASURER PLACE ASSESSED VALUE IF TAX EXEMPT
Name <u>Wm. H. Bailey</u>	<u># 05842</u>	
Street <u>2839 Florida St.</u>		
City/State/Zip <u>Spokane, WA. 99206</u>		

4 LEGAL DESCRIPTION OF PROPERTY SITUATED IN  UNINCORPORATED COUNTY  OR IN CITY OF Spokane

Street Address (if property is improved): 2839 Florida St.

Lot 37 - Block 21, Olympia Addition to Longview NO 1,005 per plot of city half of 7 Records in Volume, 5 of plot, page 49, Records of Courtiz of County

5 Is this property currently:

Classified or designated as forest land? Chapter 84.33 RCW	YES <input type="checkbox"/>	NO <input checked="" type="checkbox"/>
Classified as current use land (open space, farm and agricultural, or timber)? Chapter 84.34 RCW	YES <input type="checkbox"/>	NO <input checked="" type="checkbox"/>
Exempt from property tax as a nonprofit organization? Chapter 84.36 RCW	YES <input type="checkbox"/>	NO <input checked="" type="checkbox"/>
Seller's Exempt Reg. No. _____		
Receiving special valuation as historic property? Chapter 84.26 RCW	YES <input type="checkbox"/>	NO <input checked="" type="checkbox"/>

Property Type:  land only  land with new building  
 land with previously used building  land with mobile home  
 timber only  building only

Principal Use:  Apt. (4+ unit)  residential  
 timber  agricultural  commercial/industrial  
 other

6 Description of personal property included in gross selling price, both tangible (eg; furniture, equipment, etc.) or intangible (eg; goodwill, agreement not to compete, etc.)

If exemption claimed, list WAC number and explanation.  
 WAC No. (Sec/Sub) 45861410  
 Explanation Gift

Type of Document QCD  
 Date of Document 4/12/99

Gross Selling Price \$ \_\_\_\_\_  
 Personal Property (deduct) \$ \_\_\_\_\_  
 Taxable Selling Price \$ \_\_\_\_\_  
 Excise Tax: State \$ \_\_\_\_\_  
 Local \$ \_\_\_\_\_  
 Delinquent Interest: State \$ \_\_\_\_\_  
 Local \$ \_\_\_\_\_  
 Delinquent Penalty \$ \_\_\_\_\_  
 Total Due \$ \_\_\_\_\_

A MINIMUM OF \$2.00 IS DUE AS A PROCESSING FEE AND TAX.

8 (1) NOTICE OF CONTINUANCE (RCW 84.33 OR RCW 84.34)  
 If the new owner(s) of land that is classified or designated as current use or forest land wish to continue the classification or designation of such land, the new owner(s) must sign below. If the new owner(s) do not desire to continue such classification or designation, all compensating or additional tax calculated pursuant to RCW 84.33.120 and 140 or RCW 84.34.108 shall be due and payable by the seller or transferor at the time of sale. The county assessor must determine if the land transferred qualifies to continue classification or designation and must so indicate below. Signatures do not necessarily mean the land will remain in classification or designation. If it no longer qualifies, it will be removed and the compensating taxes will be applied. All new owners must sign.

This land  does  does not qualify for continuance.

Date \_\_\_\_\_  
 \_\_\_\_\_ DEPUTY ASSESSOR

(2) NOTICE OF COMPLIANCE (Chapter 84.26 RCW)  
 If the new owner(s) of property with special valuation as historic property wish to continue this special valuation the new owner(s) must sign below. If the new owner(s) do not desire to continue such special valuation, all additional tax calculated pursuant to Chapter 84.26 RCW, shall be due and payable by the seller or transferor at the time of sale.

(3) OWNER(S) SIGNATURE  
 \_\_\_\_\_

7 AFFIDAVIT

I Certify Under Penalty of Perjury Under The Laws of The State of Washington That The Foregoing Is True And Correct. (See back of this form).

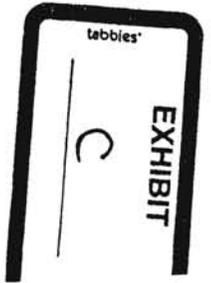
Signature of Grantor/Agent Wm. H. Bailey  
 Name (print) \_\_\_\_\_  
 Date and Place of Signing: \_\_\_\_\_

Signature of Grantee/Agent Jim & Christina L. Campbell  
 Name (print) Jim & Christina L. Campbell  
 Date & Place of Signing: 7-26-01 Kelson Court House

Perjury: Perjury is a class C felony which is punishable by imprisonment in the state correctional institution for a maximum term of not more than five years, or by a fine in an amount fixed by the court of not more than five thousand dollars (\$5,000.00), or by both imprisonment and fine (RCW 9A.20.020 (1C)).

8/02/01

08751





State of Washington  
Department of Revenue  
Miscellaneous Tax Section  
PO Box 47477  
Olympia WA 98504-7477

**REAL ESTATE EXCISE TAX  
SUPPLEMENTAL STATEMENT**  
(WAC 458-61-150)

This form must be submitted with the Real Estate Excise Tax Affidavit (FORM REV 84 0001A) for claims of tax exemption as provided below. Completion of this form is required for the types of real property transfers listed in numbers 1-5 below. Only the first white page of this form needs original signatures. A notary's signature is only required for Items 3 and 5.

**AUDIT:** The transfer referred to on this document is subject to audit by the Department of Revenue under RCW 82.45.150.

**PERJURY:** Perjury is a class C felony which is punishable by imprisonment in a state correctional institution for a maximum term of not more than five years, or by a fine in an amount fixed by the court of not more than five thousand dollars (\$5,000.00), or by both imprisonment and fine (RCW 9A.20.020 (1C)).

The persons signing below do hereby swear under penalty of perjury that the following is true (check appropriate statement):

1.  **DATE OF SALE:** (WAC 458-61-090)

I, (print name) \_\_\_\_\_ certify that the \_\_\_\_\_  
(type of instrument), dated \_\_\_\_\_, was delivered to me in escrow by \_\_\_\_\_  
(seller's name). **NOTE:** Attorney, escrow agent, title company agent, or title insurance company agent named here must sign below and indicate name of firm. No notary is required. The payment of the tax is considered current if it is not more than 90 days beyond the date shown on the instrument. If it is past 90 days, interest and penalties apply to the date of the instrument.

2.  **GIFTS:** (WAC 458-61-410) One of the following must be checked. (NOTE: For gifts, both Grantor and Grantee must sign below. No notary is required.)

- A. **NO DEBT.** Grantor gifts property which has no underlying debt. The transfer is without consideration and/or love and affection is the only consideration. See Example 1 on reverse.
- B. **THERE IS DEBT, BUT GRANTOR CONTINUES TO MAKE PAYMENTS.** Grantor gifts property to Grantee and will continue to make all payments on debt of \$\_\_\_\_\_ (please state total debt, not monthly payment) Grantee will not be making any payments on the debt for which the Grantor is liable. The transfer is without consideration and/or love and affection is the only consideration. See Example 3 on reverse.
- C. **OTHER GIFT TRANSFERS.** Grantor gifts the equity portion of the value of the property to the Grantee. Grantee will make payments toward the debt of \$\_\_\_\_\_ (please state total debt, not monthly payment) for which the Grantor is liable. In addition, Grantee will pay the Grantor \$\_\_\_\_\_. The transaction is taxable to the total of any consideration, including debt. Love and affection is not taxable. See Examples 2, 4, and 5 on reverse.

3.  **INCORPORATOR:** (WAC 458-61-375 (2G)).

I, (print name) \_\_\_\_\_, am acquiring the subject property on behalf of (print corporation name) \_\_\_\_\_. Such corporation is currently being formed. **NOTE:** Grantee must sign below. Signature must be notarized.

4.  **IRS "TAX DEFERRED" EXCHANGE:** (WAC 458-61-480)

I, (print name) \_\_\_\_\_, certify that I am acting as an Exchange Facilitator in transferring real property to \_\_\_\_\_ pursuant to IRC Section 1031, and in accordance with WAC 458-61-480. **NOTE:** Exchange Facilitator must sign below. No notary is required.

5.  **NOMINEE:** (WAC 458-61-550)

I, (print name) \_\_\_\_\_, am acquiring the subject real property as nominee on behalf of (print name of third party principal) \_\_\_\_\_ on (date of conveyance) \_\_\_\_\_. **NOTE:** Grantee and principal must sign below. Both signatures must be notarized on or prior to the date of the conveyance to nominee. This statement must be attached to the Real Estate Tax Affidavit for transfer from nominee to principal.

Escrow Agent/Attorney/Title Company Agent/Title Insurance Company Agent (Indicate name of firm):

Grantor/Nominee/Exchange Facilitator Signatures:

*Joseph Duane Bady*

Grantee/Principal/Incorporator Signatures:

*Jim F. Campbell, Christina Campbell*

**Distribution:** Separate the copies of this form and attach to the Real Estate Excise Tax Affidavit as follows:

- 1) **WHITE** - Attach to County Treasurer's Original
- 2) **CANARY** - Attach to Dept. of Revenue's Copy
- 3) **PINK** - Attach to County Assessor's Copy
- 4) **GOLD** - Attach to Taxpayer's Copy

**NOTARY:** Required only for Incorporator (Item 3) or Nominee (Item 5).

Subscribed and sworn to me this \_\_\_\_\_  
day of \_\_\_\_\_,

\_\_\_\_\_, Notary Public  
(Signature)

(Print Name)

in and for the state of \_\_\_\_\_

residing at \_\_\_\_\_

A term policy, which has no cash surrender value, is community property or separate property depending upon the characterization of the fund that paid the last premium.<sup>2</sup>

An operable community property agreement causes both policies to be entirely community.<sup>3</sup>

It has been held that a community property agreement also overrides the beneficiary designation in a public employee's retirement annuity contract with an insurance company.<sup>4</sup>

The effect of a community property agreement upon a disability insurance policy is the same; the asset is community property. Characterizing the asset as community property does not totally answer the question of who is to receive the benefits of the policy when a spouse becomes disabled.<sup>5</sup>

Disability benefits provided under federal and state law are governed by the terms and provisions of those laws, irrespective of whether the assets would otherwise be characterized to be community property.<sup>6</sup>

**§ 17.14 Modification and Rescission of Community Property Agreements**

A community property agreement is a contract<sup>1</sup> and, thus, the rules concerning modification and rescission of contracts are applicable to it.

An agreement to modify a community property agreement is a separate contract, requiring new consideration.<sup>2</sup> The modification may be in writing or it may be based on conduct.

If the modification is in writing and the writing expresses the intent to modify the community property agreement, the drafter should address

**2. Term policy**

Aetna Life Insurance Co. v. Wadsworth, 102 Wn.2d 652, 689 P.2d 46 (1984).

**3. Entirely community**

There may be a question of whether the parties intended the community property agreement to cause post separation wages to continue to be community property. See In re Marriage of Pletz, 71 Wn.App. 699, 861 P.2d 1080 (1993), rev. accepted, dismissal granted, and case ordered to be unpublished, 123 Wn.2d 1026, 873 P.2d 489 (1994). If the parties did not intend the community property agreement to characterize post separation wages to be community property, then if the premium was paid from this source, the term policy would be separate property.

**4. Annuity contract**

Harris v. Harris, 60 Wn.App. 389, 804 P.2d 1277 (1991).

**5. Becomes disabled**

See sections 11.11 and 32.17 for a further discussion of the issues concerning distribution and enjoyment of disability insurance benefits.

**6. Federal and State law**

See the discussion in Arnold v. Department of Retirement Systems, 128 Wn.2d 765, 776-80, 912 P.2d 463, 468-70 (1996). See also, In re Marriage of Geigle, 83 Wn.App. 23, 920 P.2d 251 (1996).

**§ 17.14**

**1. Is a contract**

Higgins v. Stafford, 123 Wn.2d 160, 165, 866 P.2d 31, 34 (1994).

In re Estates of Wahl, 99 Wn.2d 828, 830, 664 P.2d 1250, 1252(1983).

**2. New consideration**

See § 15.7.

both the issue remainder of t

Sometimes which does no effect of whic executing a co delivered a qui the effect of th the community

An agreem itself be a valid to its recession

The rescis spouses who h when they had agreement wh progress. Offer document, exec community pro ment needs fur ment has conve prudent drafter agreement leave revert to a separ

An agreeme be found in the full knowledge

**3. Effect of the**

In re Estate of For P.2d 848 (1982). T decision in terms of the community pro also could have hel tuted an agreement nity property agree cel from its operation

**4. Meeting of m**

Higgins v. Stafford 866 P.2d 31, 35 (19 decision in terms of the community pro also could have hel tuted an agreement nity property agree cel from its operation

both the issues of the modification being made and the validity of the remainder of the agreement.

Sometimes the writing will be in the form of a collateral document which does not mention the community property agreement, but the effect of which works as a modification. For example, where after executing a community property agreement a spouse then executed and delivered a quit claim deed to community real estate to the other spouse, the effect of the deed was to remove the real estate from the operation of the community property agreement.<sup>3</sup>

An agreement to rescind a community property agreement must itself be a valid agreement. Thus, all parties to the contract must assent to its rescission and there must be a meeting of the minds.<sup>4</sup>

The rescission may be in writing and it is fairly common that spouses who have previously executed community property agreements when they had nominal estates will later execute a rescission of the agreement when their estate has grown and estate planning is in progress. Often, the written cancellation merely takes the form of a document, executed by the parties, which recites that their previous community property agreement has been rescinded. However, this document needs further attention in that often a community property agreement has converted otherwise separate assets into community assets. A prudent drafter will address the issue of whether the cancellation of the agreement leaves assets characterized as community property or do they revert to a separate status.

An agreement to rescind a community property agreement may also be found in the conduct of the parties.<sup>5</sup> For example, if each party, with full knowledge of the act of the other, makes a later last will and

### 3. Effect of the deed

In re Estate of Ford, 31 Wn.App. 136, 639 P.2d 848 (1982). The court expressed its decision in terms of a partial revocation of the community property agreement, but it also could have held that the deed constituted an agreement to modify the community property agreement to exclude the parcel from its operation.

### 4. Meeting of minds

Higgins v. Stafford, 123 Wn.2d 160, 168, 866 P.2d 31, 35 (1994) ("Mutual intent to rescind a community property agreement must be demonstrated; unilateral acts inconsistent with the agreement are not enough").

In re Estate of Wittman, 58 Wn.2d 841, 844, 365 P.2d 17, 19 (1961).

### 5. Found in conduct

Despite the dictum in In re Estate of Wittman, 58 Wn.2d 841, 845, 365 P.2d 17, 20 (1961), expressing some doubt about rescission by conduct, the issue was laid to rest by Higgins v. Stafford, 123 Wn.2d 160, 168, 866 P.2d 31, 35 (1994), which cited with approval a statement from In re Estate of Lyman, 7 Wn.App. 945, 948, 503 P.2d 1127, 1130 (1972), aff'd 82 Wn.2d 693, 512 P.2d 1093 (1973) that a community property agreement may be abandoned "by mutually manifested intention clearly shown."

testament that provides for testate succession to a person other than the other spouse, then the parties will be deemed to have rescinded the community property agreement by their conduct.<sup>6</sup>

When a three-pronged community property agreement<sup>7</sup> is held to have been rescinded due to the conduct of the parties, an often-debated question is whether the community property agreement should be treated as if it never existed. This argument can be expected to be made by a person, spouse or otherwise, who can prosper by having assets that were recharacterized by the community property agreement to have them ruled to now be separate property. But, arguing that the effect of the rescission of the agreement operates as if it never existed misstates the nature of the community property agreement.

The three-pronged community property agreement is a continuing contract. It commences at execution and continues until revoked by the parties or termination of the marriage relationship by decree or death.

To the extent that the community property agreement has been performed during the marriage it is no longer executory. On the other hand, to the extent that the parties remain married and the community property agreement remains intact, it is executory in respect to the receipt of additional properties or the transfer of title due to the death of a party. Because it is a continuing contract, it is subject to the doctrine of partial rescission.

Partial rescission is discussed as follows:

It is the general rule that an entire or indivisible contract cannot be rescinded in part; the right to rescind must be exercised in toto, and the contract must stand in all its provisions or fall altogether. In other words, a right to rescind pertains to the whole of the contract

**6. Rescission by conduct**

In *Higgins v. Stafford*, 123 Wn.2d 160, 866 P.2d 31 (1994), the spouses executed mutual wills that were inconsistent with a community property agreement executed ten years earlier. The court ruled that the community property agreement had been rescinded by the conduct of the parties in executing the later mutual wills. It applied the principle that when two contracts are in conflict, the legal effect of the subsequent contract, made by the same parties and covering the same subject matter, but containing inconsistent terms, is to rescind the earlier contract.

See also *In re Estate of Wittman*, 58 Wn.2d 841, 845, 365 P.2d 17, 20 (1961) in which the court held that there had not been a rescission because of the failure of

the parties to prove that each relied upon the conduct of the other. This fact was recognized in the later case of *In re Estate of Ford*, 31 Wn.App. 136, 139, 639 P.2d 848, 850 (1982): "As in the case of any contract, the parties may, by mutually manifesting a clear intention to do so, abandon the community property agreement."

**7. Three-pronged**

The agreement is called "three-pronged" because it has three separate aspects to it: (1) an immediate re-characterization of separate property at the time of its execution, (2) a characterization of future assets when received, and (3) transfer to the survivor at death.

**8. Partial rescission**

17A Am.Jur.2d Contracts, § 548 (1991).

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**9. Partial res**

*Soboda v. Nolf & Pac.* 1100 (1916).

**10. Second pr**

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and cannot be exercised as to part only. A party cannot, as a rule, rescind or repudiate the unfavorable parts of a contract and claim the benefit of the residue. The theory underlying the rule is that retention of only the benefits amounts to unjust enrichment and binds the parties to a contract which they did not contemplate.

On the other hand, a partial rescission may be allowed where the contract is a divisible one and the ground of rescission relates merely to a severable part thereof. Moreover, even aside from the rights of partial rescission in cases of actual severability, instances occur in which partial rescission is allowed. *The cases in which this has been allowed do not lend themselves to satisfactory abstract statement and rest largely upon their peculiar facts. It may, however, be said that the right of partial rescission may sometimes be upheld simply because under the peculiar circumstances it is essential to a just result.*

\* \* \*

[I]t is ordinarily held that a contracting party has no right to rescind in toto on grounds which relate merely to a severable part of the contract, unless under the circumstances the default amounted to a repudiation of the contract as a whole. (Emphasis added)

Washington law has long recognized the doctrine of partial rescission of a divisible contract.<sup>9</sup>

To the extent that the spouses have performed a community property agreement, it is no longer executory. The first prong has already occurred at execution. As each asset is acquired, the second prong has characterized it as community property,<sup>10</sup> and the contract is no longer executory as to that asset.<sup>11</sup>

A similar example of a continuing partly performed and partly executory contract is an agreement between spouses to characterize the wages of a spouse as separate property. The agreement was attacked on the basis that it involved a gift, but since the wages did not exist, the agreement fell for lack of a delivery of the corpus. The wages had not yet been earned so there could be none delivered. The court upheld the agreement on the basis that the husband's agreement was a continuing offer of a gift. Each time the wife earned wages, the gift was complet-

**9. Partial rescission**

Soboda v. Nolf & Co., 91 Wash. 446, 157 Pac. 1100 (1916).

**10. Second prong**

"A community property agreement as applied to after acquired property does not instantaneously convey initially separate

property to the community but merely labels all after acquired property community immediately upon receipt." Lyon v. Lyon, 100 Wn.2d 409, 412, 670 P.2d 272 (1983).

**11. No longer executory**

See also, Merriman v. Curl, 8 Wn.App. 894, 509 P.2d 765 (1973) and cases cited therein.

ed.<sup>12</sup> To the extent that the wages had already been earned, they were the wife's separate property; to the extent that they had not yet been earned, the agreement remained executory. If the spouses subsequently rescinded the agreement, the wages earned before rescission would still belong to the wife; the wages earned after the rescission would be community property.

This distinction is noted in a different context in *Pavey v. Collins*,<sup>13</sup> where the court held that an agreement which no longer existed (was no longer executory) could not be extended. In so doing the court distinguished the situation with executory agreements:

So long as a contract remains executory, the parties thereto, acting upon sufficient consideration, may by agreement rescind, alter, modify, supplement, or replace it . . .

When a continuing contract that has been performed in parts over a period of years is then rescinded by mutual agreement, the part of the contract that is terminated is the executory part. What is done, though, is done. For example: A agrees to furnish 50 chickens to B each year in exchange for B furnishing 2 ducks to A each year, and A and B do this for ten years. At the end of ten years, A and B mutually agree to rescind their contract. Unless A and B agree to the contrary, A does not get back 500 chickens and B does not get back 20 ducks. However, A has no further obligation to furnish chickens to B and B has no further obligation to furnish ducks to A.

Often the basis of the ruling about rescissions of the community property agreement is conduct which occurred years after the agreement was executed. Proving that the conduct of the spouses showed their decision to cancel their agreement, the next step is to prove the intent of the spouses to return to square one—to undo the executed parts of the contract.

**§ 17.15 Effect of Marital Proceeding on a Community Property Agreement**

Unless the community property agreement contains language which defines the effect of the commencement of a marital proceeding<sup>1</sup> on a community property agreement, the general rule is the agreement remains in effect despite the commencement of the proceeding.

**12. Gift was completed**

*Yake v. Pugh*, 13 Wash. 78, 42 P. 528 (1895).

**13. Different context**

*Pavey v. Collins*, 31 Wn.2d 864, 870, 199 P.2d 571 (1948).

**§ 17.15**

**1. Contains language**

The term *marital proceeding* includes proceedings for dissolution of marriage, for legal separation, or for a decree of invalidity.

The community property right of the parties which is subject to the agreement, the agreement generally entitles the parties to a community property agreement at the time of the marriage there is no proceeding.<sup>4</sup>

Having a community property agreement or only a portion of the community property agreement when a marital proceeding is commenced, the community property agreement which exist at the time of the commencement of the proceeding is acquired in the community property agreement at the time of the commencement of the proceeding.

1. The community property agreement, after the commencement of the proceeding, was commenced.

2. The community property agreement, after the death of the party, but

3. It may be characterized as a community property agreement at the commencement of the proceeding.

Since the community property agreement is the effect of the commencement of the proceeding, the parties free of

2. Absence of

See § 17.14, and modification

3. Remains

In re Estate of [Name], 949-50, 503 P.2d [Page]

4. There is

In re Marriage of [Name], 655, 565 P.2d 79

5. Character

See § 17.8.

6. Acquired

See § 17.9.

## TER 17

## ERTY AGREEMENTS

## Sections

ly for Agreement—Generally.  
munity Property Agreements.

Assets—Generally.  
ic Assets—Existing Assets, Community

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Community Property Agreement.  
reement at Death.

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## ther Commentary

s: Non-Probate Disposition of Community  
Rev. 591-621 (1998).

## Upon the death

In re Estate of Catto, 88 Wn.App. 522,  
944 P.2d 1052, 1054 (1997).

## w Authority for Agreement—

89, 915 P.2d 575 (1996), was later affirmed  
y the Supreme Court, 132 Wn.2d 318, 937  
2d 1062 (1997).

## ect of Community Property

Community property agreements are con-  
acts, and courts must give effect to the  
rties clearly expressed intent. Therefore,  
hen a community property agreement  
ves a fee simple grant of the community  
tate to the surviving spouse, any further  
tempt to grant remainders in third par-

ties upon the death of both spouses is a  
nullity. *Wilkes v. O'Bryan*, 98 Wn.App. 411,  
989 P.2d 594 (1999).

The state's jurisdiction over domestic re-  
lations matters involving Indians or Indian  
territory, does not authorize a trial court in  
a divorce proceeding to declare that a com-  
munity property agreement conveyed own-  
ership of Indian trust lands to the commu-  
nity. *Marriage of Landauer*, 95 Wn.App.  
579, 975 P.2d 577 (1999).

See RCW 26.16.120.

## 4. Schweitzer

The Supreme Court affirmed the Court of  
Appeals in *Schweitzer*. In re Marriage of  
*Schweitzer*, 132 Wn.2d 318, 937 P.2d 1062  
(1997). The decision was based upon the  
mistake about the effect of the agreement  
being only unilateral on the part of the  
husband. The court recognized that if the  
mistake had been mutual, the agreement  
could be avoided.

## § 17.6 Effective Date of Agreement

## 2. On the date executed

In re Marriage of *Schweitzer*, 132 Wn.2d  
318, 937 P.2d 1062 (1997)(the standard-  
form, three-pronged community property

agreement converts separate property to  
community property at the time of execu-  
tion).

## § 17.7 Effect of Agreements on Specific Assets—Generally

## 1. Are characterized

In re Marriage of *Schweitzer*, 132 Wn.2d  
318, 937 P.2d 1062 (1997)(the standard-  
form, three-pronged community property  
agreement converts separate property to  
community property at the time of execu-  
tion).

surviving spouse nullifies any further at-  
tempt to grant remainders in third parties  
upon the death of both spouses. The surviv-  
ing spouse is free to dispose of the property  
during his or her lifetime without limita-  
tion. *Wilkes v. O'Bryan*, 98 Wn.App. 411,  
989 P.2d 594 (1999).

## 3. Vested at death

A community property agreement's fee  
simple grant of the community estate to the

In re Estate of *Catto*, 88 Wn.App. 522,  
944 P.2d 1052, 1054 (1997).

§ 17.8 Effect of Agreements on Specific Assets—Existing As-  
sets, Community and Separate

## 1. Including real estate

In re Marriage of *Schweitzer*, 132 Wn.2d  
318, 937 P.2d 1062 (1997)(the standard-  
form, three-pronged community property

agreement converts separate property to  
community property at the time of execu-  
tion).

§ 17.14 Modification and Rescission of Community Property  
Agreements

## 4. Meeting of minds

In re Estate of *Catto*, 88 Wn.App. 522,  
944 P.2d 1052, 1055 (1997).

acts having the effect of rescinding the  
agreement are sufficient to demonstrate  
such an intent. However, under the facts of  
the case no rescission was found. *Wilkes v.*  
*O'Bryan*, 98 Wn.App. 411, 989 P.2d 594  
(1999).

## 5. Found in conduct

Citing *Higgins v. Bradford*, 123 Wn.2d  
889, 866 P.2d 31 (1994), the Court of Ap-  
peals held that a community property  
agreement may be rescinded if a mutual  
intent to rescind is demonstrated. Mutual

## 6. Rescission by conduct

In re Estate of *Catto*, 88 Wn.App. 522,  
944 P.2d 1052, 1055 (1997).

§ 17.15 Effect of Marital Proceeding on a Community Prop-  
erty Agreement

## 3. Remains in effect

In re Estate of *Catto*, 88 Wn.App. 522,  
944 P.2d 1052, 1055 (1997).

## 10. It is questionable