

NO. 80925-9

SUPREME COURT OF THE STATE OF WASHINGTON

ARTHUR R. GILROY,

Respondent,

vs.

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

Petitioner.

Supplemental Brief of Respondent, Arthur R. Gilroy

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STATEMENT OF THE CASE

There are no facts in dispute. Jeanette Borghi died on June 25, 2005. (CP 11) No document purporting to be a will was located among the decedent personal effects. (CP 12) Petition for probate was filed by the surviving spouse, Bobby G. Borghi on October 4, 2005. (CP 11-17) Since that time Mr. Borghi has passed away and a Successor Personal Representative has been appointed. (CP 141—143) The Estate of Jeanette Borghi is the Respondent. The Appellant is the son of the Decedent, Arthur R. Gilroy.

The real property that is the subject of this appeal is located in Pierce County, Washington. (CP 13) It was purchased by the Decedent, Mrs. Borghi, prior to her marriage to Mr. Borghi. (CP 80) It was purchased by a Real Estate Contract on March 16, 1966. (CP 80) Mr. and Mrs. Borghi were married on March 29, 1975. (CP 75) The Statutory Warranty Deed in fulfillment of the Real Estate Contract to the property was issued by the vendor Cedarview Development Company on June 12, 1975, to both as husband and wife. (CP 80)

A Petition for Declaratory Judgment Determining Title to Real Property was filed by the Estate on August 21, 2006. (CP 18) The Petition sought to have the property declared to be community property, therefore vesting in the surviving spouse. (CP 18) Arthur R. Gilroy argues that the real property is the separate property of the Decedent; therefore he would have an undivided one-half interest in the property. (CP 109-126) An Order

Granting Declaratory Judgment Determining Title to Real Property was entered by the Court Commissioner on September 25, 2006. (CP 127-132) That order decreed that the real property was community property and therefore vested in the surviving spouse.

Arthur R. Gilroy filed a motion for revision of the Commissioner's Order. (CP 133-134) Judge Michael Fox entered an Order denying the Motion for Revision on November 3, 2006. (CP 139-140) The ruling upheld the ruling of the Commissioner.

Division One reversed.

"We review de novo a trial court's classification of property as community or separate." *In re Marriage of Chumbley*, 150 Wn. 2d 1, 5, 74 P.3d 129 (2003). Findings of fact are reviewed for substantial evidence. *In re Marriage of Skarbek*, 100 Wash. App. 444, 447, 997 P.2d 447 (2000). The character of property is established at acquisition *Id.*

"When it appears that property was once separate, it is presumed to maintain that character until there is some direct and positive evidence to the contrary." *In re Estate of Madsen*, 48 Wn. 2d 675, 676-77, 296 P.2d 518 (1956) (citing *Hamlin v. Merlino*, 44 Wn.2d 851, 272 P.2d 125 (1954)).

The proponent of community property has the burden of proving the change in character of the property. *Jones v. Davis*, 15 Wn.2d 567, 569, 131 P.2d 433 (1942). A writing is required to show the parties' mutual

intention to convert property from separate into community property. *In re Estate of Verbeek*, 2 Wash. App. 144, 158, 467 P.2d 178 (1970).

"The ownership of real property becomes fixed when the obligation becomes binding, that is, at the time of execution of the contract of purchase." *Beam v. Beam*, 18 Wash. App. 444, 453, 569 P.2d 719 (1977). The time of payment, delivery or conveyance does not affect the initial characterization of the property. *In re Estate of Binge*, 5 Wn. 2d 446, 484, 105 P. 2d 689 (1940).

Once property has been established to be separate property, the proponent of community property status must demonstrate some "**direct and positive evidence**" of a change in its character. *Binge*, 5 Wn.2d at 485, 105 P.2d 689.

ARGUMENT

A. The property was brought into the marriage by the decedent as a separate property:

The rule regarding time and manner of acquisition was recognized by the court in the **Matter of the Estate of William F. P. Binge v. Mumm**, 5 Wn.2d 446, 484, 105 P.2d 689 (1940) where the court announced:

It is the rule in this state that the status of property, whether real or personal, becomes fixed as of the date of its purchase or acquisition; and that the status, when once fixed, retains its character until changed by agreement of the parties or operation of law. Property acquired through contractual obligation, as between husband and wife and all others claiming under them, has its origin and is acquired as of the date when the obligation becomes binding, and not

as of the time when the money is paid or the thing is delivered or conveyed. The fruit of the obligation is legally acquired as of the date when the obligation becomes binding. [Emphasis added]

The property was acquired by Mrs. Borghi on March 16, 1966, nine years prior to marriage, as her separate property.

Other commentary and cases follow the rule that property is characterized as of the date of acquisition. **Kenneth W. Weber, 19 Washington Practice, Family and Community Property Law, §11.6 (1997).** *In re Marriage of Skarbek*, 100 Wn. App. 444, 997 P.2d 447 (2000); *In re Marriage of Gillespie*, 89 Wn. App. 390, 948 P.2d 1338 (1997); *In re Marriage of Wedlock*, 69 Wn. App. 484, 849 P.2d 1243, *review denied*, 122 Wn.2d 1014 (1993).

Additionally, **Professor Harry M. Cross** in his seminal article states:

The author [Cross] thus believed it desirable that there be clear adoption of the mortgage rule in installment acquisitions: the ownership character of an asset acquired in performance of a contractual purchase obligation should be the same as the character of the initial obligation. (**Harry M. Cross, THE COMMUNITY PROPERTY LAW IN WASHINGTON, Vol. 49: 729, 762 1974.**)

Professor Cross also quotes: "McKay insisted that an asset conveyed after marriage in fulfillment of an ante nuptial contract was necessarily separate property." (**Harry M. Cross, THE COMMUNITY PROPERTY LAW IN WASHINGTON, Vol. 49: 729, 760 1974** quoting: G. McKay, *COMMUNITY PROPERTY* ch. 31 (2d ed. 1925). According to Professor Cross:

Property acquired through contractual obligation, as between husband and wife and all other claiming under them, has its origin and is acquired as of the date when

the obligation becomes binding, and not as of the time when the money is paid or the thing is delivered or conveyed. The fruit of the obligation is legally acquired as of the date when the obligation becomes binding. Harry M. Cross, THE COMMUNITY PROPERTY LAW IN WASHINGTON, Vol. 49: 729, 1974, citing *Binge*, supra.

When acquiring property by real estate contract, the ownership of real property becomes fixed when the obligation becomes binding, that is, at the time of execution of the contract of purchase. **Stokes v. Polley**, 145 Wn. 2d 341, 37 P. 3d 1211 (2001); **Beam v. Beam**, 18 Wn. App. 444, 453, 569 P.2d 719 (1977).

"Property is not characterized by title or the name under which it is held." **Kenneth W. Weber**, 19 Washington Practice, Family and Community Property Law, §10.7 (1997); **In re Marriage of Skarbek**, 100 Wn. App. 444, 448, 997 P. 2d 447 (2000); **In re Marriage of Hurd**, 69 Wn. App. 38, 848 P. 2d 185, review denied, 122 Wn. 2d 1020 (1993).

B. The property was not converted to community property:

The law in Washington is: *"that specific real or personal property once becoming separate property remains so, unless by voluntary act of the spouse owning it its nature is changed."* **Volz v. Zang**, 113 Wash. 378, 382, 194 Pac. 409 (1920). Also, **In the Matter of the Estate of Dewey T. Verbeek, Sr. v. Irene L. Verbeek**, 2 Wn. App. 144, 467 P. 2d 178 (1970) the court stated: *"that mere joinder in a contract, mortgage or deed by husband and wife or by two parties living together prior to marriage is insufficient to convert property into community property."*

C. The parties' refinance did not create community property.

This very issue was first raised in *Guye v. Guye*, 63 Wash. 340, 352-53; 115 Pac. 731 (1911) where the court held:

[T]he right of the spouses in their separate property is as sacred as is the right in their community property, and when it is once made to appear that property was once of a separate character, it will be presumed that it maintains that character *until some direct and positive evidence to the contrary is made to appear. Nor do we think the fact that the spouses have joined in mortgaging property sufficient evidence on which to found a claim that the property mortgaged is community property.* While the statute allows a husband or wife to sell and encumber his or her separate property, yet no prudent purchaser or mortgagee will ever take the separate deed or mortgage of a married man or married woman even when the other spouse sits by and disclaims interest. Such a deed or mortgage always requires explanation in subsequent dealings with the property whenever either of them forms a part of the chain of title, rendering the property less easy of disposition than it otherwise would be. *The fact that both spouses joined in the encumbrances put on the property in this instance is, therefore, little or no evidence that the property was community rather than separate property.* [Emphasis added]

D. The Statutory Warranty Deed prepared by grantor is insufficient to express Mrs. Borghi's intent to convert her separate property to community property.

In this case Mrs. Borghi had the means available to express her intent to convert her separate property into community; however she did not take such action. For the characterization of property to change there must be a specific and voluntary act that expressed Mrs. Borghi's intent to make the property community rather than to allow it to remain separate property.

The requirement of express intent is reiterated in *Volz v. Zang*, 113 Wash. 378, 382, 194 Pac. 409 (1920 quoting *Guye v. Guye*, 63 Wash. 340, 115 Pac. 731 (1911), where the court explained: "We think the statute

meant to declare that a specific article of personal property, or a specific tract of real property, once the separate property of one of the spouses, no matter how it may fluctuate in value, remains so, unless, by the voluntary act of the spouse owning it, its nature is changed."

"In order to convert separate property into community property, the mutual intention of the parties must be evidenced by a writing." *Marriage of Shannon*, 55 Wn. App. 137, 140, 777 P. 2d 8 (1989). 'Once established, separate property retains its separate character unless changed by deed, agreement of the parties, operation of law, or some other direct and positive evidence to the contrary.' *In re Marriage of Skarbek*, 100 Wn. App. 444, 447, 997 P. 2d 447 (2000); see also RCW 26.16.010. And in general, '[t]he burden is on the spouse asserting that separate property has transferred to the community to prove the transfer by clear and convincing evidence, *In re Marriage of Skarbek*, 100 Wn. App. 444, 447, 997 P. 2d 447 (2000), *Marriage of Shannon*, 55 Wn. App. 137, 140, 777 P. 2d 8 (1989).

Therefore, while Mr. Borghi's name may appear on the Statutory Warranty Deed the Washington Courts uniformly hold that this is not enough to allow a presumption that the property that was once characterized as separate property should not be considered community property without some direct and positive evidence to the contrary.

Had the parties intended on creating community property they would have created a conveyance. Mrs. Borghi could have executed a Quit Claim Deed to the community or the parties could have executed a Community

Property Agreement. They did neither. As shown in the section below, she could have told disinterested witnesses of her intent. She did not.

E. The facts in Hurd are completely distinguishable from Borghi.

In Hurd, *In re Marriage of Hurd*, 69 Wn. App. 38, 848 P.2d 185, review denied, 122 Wn.2d 1020 (1993), Mr. Hurd testified that he often put property in both of the parties' names for love and consideration. The Court remanded the case to determine what Mr. Hurd meant by that phrase.

The specific holding in Hurd was: "We now hold 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. We also hold that there must be clear and convincing proof to overcome such a presumption." *Hurd*, supra at 51

In Borghi, the undisputed facts are that Mrs. Borghi purchased the property by real estate contract and that it was brought into the marriage as separate. There were no "separate funds."

The court analyzed the conflict between *In re Estate of Deschamps*, 77 Wn. 514, 137 P. 1009 (1914) and *Hurd v. Hurd*, 69 Wash. App. 38, 50, 848 P.2d 185 (1993) review denied, 122 Wn.2d 1020, 863 P.2d 1353 (1993).

The Court stated that they essentially reached opposite results in those two cases with similar facts. Those two cases, however, have a

common ingredient that *Borgh* does not. In both of those cases there was positive and direct evidence of the intent of the decedent to convey a separate interest to community. There is no direct evidence of Mrs. Borghi's intent to convert her separate property to community.

In *Deschamps*, supra, there were two independent, disinterested witnesses that testified as to the intent of the decedent to convey an interest in her separate property to her surviving spouse. In *Hurd*, Mr. *Hurd* testified in general terms that he often put property in both of the parties' names for "love and consideration".

There is no testimony from Mrs. *Borgh* as to what her intent was with her separate property. The burden is on the Estate to establish positive and direct evidence.

CONCLUSION

There is no positive and direct evidence that Mrs. *Borgh* intended to title the property in the name of the marital community. The Estate wishes the court to abandon the requirement that there be such positive and direct evidence of the intent of the owner of the separate property.

To allow separate property to be converted to community property, that is to say a community titling presumption, without evidence of the intent of the owner of the separate property, is dangerous. Mere acceptance of a Statutory Warranty Deed in the name of the community without positive and direct evidence of the intent of owner of the separate property to create community property goes far beyond what the court contemplated.

The decision of the Court of Appeals should be upheld.

Dated this 15th day of August, 2008



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