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Community Property—Statutory Agreement for Disposition at Death—Termination

C. David Sheppard

COMMUNITY PROPERTY

Statutory Agreement for Disposition at Death — Termination. Recently adopted Initiative 208[1] has evoked no small amount of comment,[2] much of which centers about the problems of uncertainty, utility, and questioned reception and treatment by the courts. Although passed with the stated aim of eliminating probate expenses, the uncertainty of the Initiative may well occasion, in the individual case, as much or more litigation expense than probate ever would. This consideration, where survivorship is the end sought, may well lead to increased use of the relatively more certain community property agreement.[3] Because of this possibility of increased use, and because *In re Wittman*[4] emphasizes the manner in which community property agreements may be terminated, a few brief comments[5] on this recent case are deemed to be merited.

In re Wittman involves a validly executed and recorded community property agreement whereby the parties agreed that all property theretofore or thereafter acquired would be community property and that upon the death of either, the community property would vest in the survivor.[6] Several years after the execution of the instrument, the wife made a will disposing of her half of the community property, none of which was to go to the husband. In this will she recited that it was her understanding that her husband was disposing of his half of the property in the manner he saw fit.[7] The husband did make such a will—five months later—but, as the trial court found, without any knowledge

[1] RCW 64.28.010-.030.

[2] *E.g.*, Cross, *Joint Tenancy for Washington?*, 35 WASH. L. REV. 292 (1960); Symposium, *Joint Tenancy in Washington*, 37 WASH. L. REV. 1-100 (1962).

[3] RCW 26.16.120. "Agreements as to status. Nothing contained in any of the provisions of this chapter or in any law of this state, shall prevent the husband and wife from jointly entering into any agreement concerning the status or disposition of the whole or any portion of the community property, then owned by them or afterwards to be acquired, to take effect upon the death of either. But such agreement may be made at any time by the husband and wife by the execution of an instrument in writing under their hands and seals, and to be witnessed, acknowledged and certified in the same manner as deeds to real estate are required to be, under the laws of the state, and the same may at any time thereafter be altered or amended in the same manner:...."

[4] 58 Wn.2d 841, 365 P.2d 17 (1961).

[5] An extensive treatment of the community property agreement may be found in Comment, *The Community Property Agreement Statute*, 25 WASH. L. REV. 165 (1950).

[6] Although it is customary to speak of the statutory community property agreement as providing for the survivor to take all of the community property, the statute is not so limited. It provides for the "disposition of the whole or *any portion* of the community property . . . ." (Emphasis added.)

[7] The specific provision was: "[I]t is my desire that he [the husband] obtain no portion of my half of the community property for the reason it is my understanding he is disposing of his half of the community property in a manner he sees fit." 58 Wn.2d at 844, 365 P.2d at 19.

of the wife's will. The wife, of course, at the time of the execution of her will could have no knowledge of the husband's subsequently executed will. Following the death of the husband, the community property agreement was brought to the attention of the administrator, who thereafter sought distribution of the property in accordance with the agreement. The legatees under the husband's will appeared and contested such distribution on the ground that the agreement had been abandoned by the parties and should not be given any effect. The trial court found that the agreement had been neither modified, revoked nor abandoned by the parties.

On appeal the legatees urged that the agreement had been terminated in one of three ways: (1) by oral agreement reduced to writing in the wife's will; (2) by the acquiescence of one party in the acts of the other; (3) or by the separate acts of the parties in making wills, amounting to repudiation by both. As to the first contention, the court held that the language of the wife's will, although prophetic, was not evidence of an oral agreement (no other evidence of the alleged oral agreement was introduced). As to the second, the court held that there could be no acquiescence in the face of the trial court's correct finding that neither party had knowledge of the other's will. As to the third argument, the court held that there could be no rescission[8] based upon the execution of the wills in reliance upon the other party's repudiation, because there could be no reliance without knowledge. In closing, the court said:

> Even if mutual repudiation may, under circumstances not here present, constitute a rescission, we are not prepared to subject the statutory community property agreement, which serves as a recorded conveyance of property to the surviving spouse, to the cloud of uncertainty such a rule would cast upon the record and, hence, the title to the property.[9]

Since the court emphasized the lack of any agreement between the husband and wife to rescind or abandon the community property agreement, the recording or failure to record would probably not be too influential where non-agreement is shown.

What does seem to be clear from the case is that while the husband and wife maintain the marital status, some type of agreement will be necessary to terminate the survivorship effect of the community prop-

[8] Obviously the court is not using the term "rescission" in the contractual sense, RESTATEMENT, CONTRACTS § 406 (1932), but rather in the sense of nullification of the community property agreement.

[9] *In re* Wittman, 58 Wn.2d 841, 845, 365 P.2d 17, 20 (1961).

erty agreement.[10] No matter how strong the independent desire to terminate may be, there must be an agreement.

What is left unclear is whether this agreement must be in writing or whether an oral mutual termination will suffice. The statute[11] clearly requires written amendment or alteration, but is silent on the subject of revocation or termination. If the court continues its attitude of reluctance to allow doubt to be cast upon the recorded agreement, surely it will be hesitant to accept an oral termination.

C. DAVID SHEPPARD

CONSTITUTIONAL LAW

Equal Protection and Seattle's Juke Box Ordinance. In 1958 the Seattle City Council promulgated Ordinance No. 83784,[1] which regulated the ownership and operation of juke boxes within the city. By the terms of this ordinance, one could own a juke box only upon the acquisition of a "juke box operator's license." Yet the ordinance authorized fewer consents than were already outstanding, and its prospective effect was such as to exclude all but existing licensees from the juke box field.[2] Thus, when L. D. Ragan applied for an "operator's license" his application was denied. Ragan sought a judgment declaring this ordinance unconstitutional, and from an adverse ruling by the trial court, prosecuted an appeal. *Ragan v. City of Seattle*[3] affords an opportunity to explore the equal protection problems which arise upon a municipal corporation's exercise of regulatory power.

[10] The community property agreement statute, RCW 26.16.120, controls the disposition of community property only. An agreement which controls the character of the ownership of property theretofore or thereafter acquired is a case law development outside the scope of the statute. Once all or a part of the property of the spouses is changed to community property by this type of agreement, the statutory agreement will control its disposition. The inter vivos effect of the common law community property agreement on the property acquired after a separation, where the parties have terminated the marital relationship in fact, though not in law, may be terminated by the conduct of the parties under the result reached by the court in *In re* Janssen, 56 Wn.2d 150, 351 P.2d 510 (1960); *In re* Armstrong, 33 Wn.2d 118, 204 P.2d 500 (1949); Togliatti v. Robertson, 29 Wn.2d 844, 190 P.2d 575 (1948). Thus, the statutory agreement, in such a situation, would have less to operate upon; but it would operate unless terminated by agreement.

[11] RCW 26.16.120, set out at note 4 *supra*.

[1] Seattle, Wash., Ordinance 87384, July 24, 1958.

[2] Ragan v. City of Seattle, 158 Wash. Dec. 777, 782, 364 P.2d 916, 919 (1961). The court points out that by the terms of this ordinance, no one can own a juke box without an operator's license, and a holder of such a license has the legal right to own up to one hundred and fifty machines which he may lease to others. The number of such licenses is limited to one for every 10,000 Seattle residents according to the last available federal census. Thus, with a 1960 census of 557,087, only 55 "operator's licenses" were authorized; in October of 1959, 69 licenses were outstanding.

[3] 158 Wash. Dec. 777, 364 P.2d 916 (1961).