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Recent Community Property Decisions

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RECENT COMMUNITY PROPERTY DECISIONS

Washington: Character of Federal Savings Bonds Purchased with Community Funds. *In re Allen's Estate*[1] involved a dispute over the separate or community nature of federal savings bonds. H was the registered owner of Series E, U. S. Savings Bonds which he had purchased during marriage with community funds, naming W as beneficiary. Washington community property law provides that all property acquired during marriage except by gift, devise or descent belongs to the community.[2] On the other hand, the federal treasury regulations provide that the registration of savings bonds shall be conclusive evidence of ownership.[3] W having predeceased H, a conflict arose as to the community or separate status of the bonds. The case came up on appeal from a trial court order requiring H, as administrator of W's estate, to inventory the bonds as community property. The Washington Supreme Court held that the character of ownership was to be determined under the community property law of the state, rejecting the husband's contention that, as registered owner, the bonds were his separate property under the treasury regulations. In so holding, the court found: (1) the regulations were for the government's convenience and to to avoid numerous transfers but that the United States had no concern to whom the money belonged after the bonds were

[1] 154 Wash. Dec. 748, 343 P.2d 867 (1959).

[2] RCW 26.16.010 and RCW 26.16.020 define separate property as property owned before marriage and that acquired after marriage by gift, devise, or descent, and the rents, issues and profits thereof. RCW 26.16.030 provides that, with the exception of the above statutes, all property acquired after marriage by either husband or wife or both, is community property. California-Western States Life Ins. Co. v. Jarman, 29 Wn.2d 98, 185 P.2d 494 (1947); Small v. Bartyzel, 27 Wn.2d 176, 177 P.2d 391 (1947); *In re* Towey's Estate, 22 Wn.2d 212, 155 P.2d 273 (1945).

[3] "United States Savings Bonds are issued only in registered form. The form of registration used must express the actual ownership of and interest in the bond and, except as otherwise specifically provided in Subpart E and § 315.48 of Subpart I of this part, will be considered as conclusive of such ownership and interest." 31 Code of Federal Regulations, Money & Finance: Treasury, chapter 2, § 315.5, p. 472.

"Savings bonds are not transferable and are payable only to the owners named thereon, except as specifically provided in the regulations in this part and then only in the manner and to the extent so provided. . . ." 31 Code of Federal Regulations, Money & Finance: Treasury, chapter 2, § 315.15, p. 477.

[4] "If either co-owner of United States savings bonds registered in two names as co-owners (in the alternative) dies without having presented and surrendered the bond for payment to a federal reserve bank or the treasury department, the surviving co-owner will be the sole and absolute owner of the bond." RCW 11.04.230.

"If the registered owner of United States savings bonds registered in the name of one person payable on death to another dies without having presented and surrendered the bond for payment or authorized reissue to a federal reserve bank or the treasury

paid; (2) as the Washington statutes[4] providing for sole and absolute ownership in the surviving co-owner or beneficiary of U. S. Savings bonds do not cover a situation where the beneficiary predeceased the registered owner, ownership was to be determined under state community property law; (3) the bonds, being purchased with community funds, were community property; otherwise a designing spouse could transfer community into separate property through their purchase.

The federal treasury regulations referring to ownership of Series E, U. S. Savings Bonds have been subjected to varying interpretations in state courts. Some courts hold that they set up absolute property rights which supersede state property laws under the supremacy clause of the Constitution.[5] These rights are set up as an inducement to purchasers under the borrowing power of the federal government and are to be applied with uniformity throughout the states under congressional mandate. This approach was seemingly adopted by the Texas court in *Ricks v. Smith*,[6] which involved co-ownership bonds purchased by the husband with community funds. Upon his death the wife as registered co-owner claimed the bonds as her separate property under the survivorship provisions of the federal regulations. It was held that the wife was sole owner, irrespective of Texas community property law.[7]

Other courts reject the property approach but treat the regulations as inherent provisions of a contract between the purchaser and the federal government.[8] Recognizing that Congress, under the borowing

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department, and is survived by the beneficiary, the beneficiary will be the sole and absolute owner of the bond." RCW 11.04.240.

[5] An example of this type of reasoning is that espoused by the United States Supreme Court in the case of Wissner v. Wissner, 338 U. S. 655 (1950), which involved interpretation of the National Service Life Insurance Act providing that the insured has the right to designate the beneficiary of the policy, and that no person should have a vested right in the proceeds of the policy. 38 U.S.C. § 802(g), (i) (1946). The court held that the named beneficiary was entitled to the proceeds on the basis of the supremacy of federal law despite the wife's claim that she was entitled to a one half interest therein as owner due to the fact that her deceased husband purchased the policy with community funds. See Note, 26 WASH. L. REV. 61 (1951). Although the decision is of some argumentative value in the savings bond area, the case is readily distinguishable due to the different nature of the NSLI policy and statutory language governing its ownership.

[6] 318 S.W.2d 439 (Tex. 1958); Noted in 37 TEXAS L. REV. 770 (1959).

[7] "To give supremacy to Federal regulations no more affects community property law than laws of descent and distribution." *Supra* note 6 at 442. In the later case of Hilley v. Hilley, 327 S.W.2d 467, 468 (Tex. 1959), the Texas court expressly limited the holding in the *Ricks* case to government savings bonds cases involving the supremacy of federal law. Thus, it was held that securities purchased with community funds and issued to *H* and *W* "as joint tenants with right of survivorship and not as tenants in common," at the instruction of the husband in the wife's presence, did not entitle the wife to sole ownership thereof on the husband's death.

[8] Hinson v. Plowden, 91 F. Supp. 836 (1950 D.C.S.C.); Conrad v. Conrad, 66 Cal. App.2d 280, 152 P.2d 221 (1944); Erwin v. Conn, 225 N.C. 267, 34 S.E.2d 402 (1945).

power, may regulate and adjust contracts so that property might be subject to succession by survivorship, those courts treat the bonds as insurance contracts which provide a valid will substitute but do not necessarily change the initial character of ownership. Thus the beneficiary or surviving co-owner may not be deprived of his contractural right on the basis of state Statute of Wills provisions or gift law.

The third approach, and that apparently accepted by the Washington court in the *Allen* case, interprets the regulations as having been passed merely for the administrative convenience of the federal government in dealing with claims arising under the bonds, but in no way intending to change state law in respect to the creation of property rights.[9] This interpretation was adopted by the Louisiana court in the case of *Slater v. Culpepper*[10] which involved co-ownership bonds purchased by the wife with community funds at a time when the husband was physically incapacitated. The husband, having survived the wife, claimed the bonds as surviving co-owner under the treasury regulations. The court held the bonds to be community property, finding no intent on the part of the purchasing wife to employ the bonds as a method of disposing of her community interest upon death, and stating that any other conclusion "would greatly endanger the recognized right of the wife to make a disposition by testament of her vested one half interest in the community property."[11] In arriving at its decision in the *Allen* case, the Washington court examined the approaches taken in the *Slater* and *Ricks* cases respecting the impact of the federal regulations on state community property law, and approved the interpretation of the Louisiana court while rejecting the supremacy argument set forth in the Texas opinion.

The proposition stated by the Louisiana court, to the effect that the regulations were merely for the convenience of the United States in making payments, was not new to Washington. The problem of interpreting the treasury regulations was before the court in the case of *Decker v. Fowler*,[12] in which the named beneficiary of U. S. Savings Bonds claimed the proceeds upon the death of the registered owner. The court held that since the regulations were merely for the government's convenience in making payments, the designation of benefici-

[9] *In re* GLADNEY, 233 La. 949, 67 So. 2d 547 (1953); Gladieux v. Parney, 93 Ohio App. 117, 106 N.E.2d 317 (1951); Sinift v. Sinift, 229 Iowa 56, 293 N.W. 841 (1940).

[10] 222 La. 962, 64 So. 2d 234 (1953); See 37 A.L.R.2d 1216 for a review of the Slater case as well as other cases involving the interpretation of federal savings bonds regulations.

[11] Slater v. Culpepper, *supra* note 10.

[12] 199 Wash. 549, 92 P.2d 254 (1939).

aries constituted an ineffective gift transfer in violation of the state Statute of Wills. The decision was out of line with the "majority rule" to the effect that the bonds constituted a contract between the purchaser and the federal government, the regulations being inherent provisions creating contract rights in the third party beneficiary.[13]

To abrogate the holding in the *Decker* case, the legislature enacted RCW 11.04.230[14] providing that the surviving co-owner of U. S. Savings bonds shall be sole and absolute owner, and RCW 11.04.240[15] providing that upon the death of the registered owner of beneficiary bonds, the beneficiary will be sole and absolute owner. Since the statutes did not cover the particular problem in the *Allen* case, in which the beneficiary predeceased the registered owner, we are still confronted with the question of the impact of our two statutes on community property rights. The conflict would be best illustrated in a case where H purchased bonds with community funds and named a stranger to the community as co-owner or beneficiary. The wife should be able to get part of the proceeds from the named co-owner or beneficiary stranger to avoid being fraudulently deprived of community funds by the purchasing spouse.[16] The obvious intent of the Washington statutes was to override the holding in the *Decker* case that the use of beneficiary bonds was ineffective as a will substitute. The question of the impact, on community property incidents of ownership, of the statutory provisions for sole and absolute ownership in the surviving co-owner or beneficiary was probably not considered by the legislature. The statutes probably would not preclude the imposition of a constructive trust, at least to the extent of the wife's community interest therein, on the survivor or beneficiary stranger.[17]

Turning now to the situation where H and W are named as parties to the bonds, the possible effect of the statutes is far from clear. U. S.

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[13] See Comment, *Donee Beneficiaries-Decker v. Fowler,* 14 WASH. L. REV. 312 (1939).

[14] *Supra* note 4.

[15] *Supra* note 4.

[16] Even courts adopting the Supremacy approach hold that the proceeds may be pursued in cases of fraud or inequitable conduct. See Anderson v. Benson, 117 F. Supp. 765, (D.C. Neb. 1953); Henderson's Adm'r v. Bewley, 264 S.W.2d 680 (Ky. 1953); Chase v. Leiter 96 Cal. App.2d 439, 215 P.2d 756 (1950).

[17] In Occidental Life Ins. Co. v. Powers, 192 Wash. 475, 74 P.2d 27, 114 A.L.R. 531 (1937), the wife was able to set aside in toto, her deceased husband's designation of a stranger beneficiary in a life insurance policy on the grounds that such a designation constituted an attempt to make a gift of community property without the consent of the wife. See Cross, *The Community Property Law in Washington,* 15 LA. L. REV. 640 (1955). In view of the statutory provisions upholding ownership in the survivor in savings bonds cases, the wife's recovery will probably be limited to recouping her one half of the community share.

Savings Bonds come in both co-ownership and beneficiary varieties. Under Washington community property law, each spouse is entitled to dispose of his half of the community estate upon his death.[18] (1) In the case of *beneficiary* bonds, the surviving non-purchasing spouse should be entitled to the proceeds, the purchaser's testamentary intent being inferred from the designation of the surviving spouse as beneficiary.[19] As indicated in the *Allen* case, this rationale should in no way affect the community character of the bonds prior to the death of the registered owner, unless it can be shown that a change in the initial character of the property was agreed to by the non-purchasing spouse.[20] The *Allen* case held that when the bonds were acquired by H with community funds they belonged to the community. (2) In the case of *co-ownership* bonds, the intent of the purchasing co-owner to dispose of his community interest upon death is not so easily inferred. Both the *Slater*[21] and *Rick*[22] cases involved surviving co-owners claiming as their separate property bonds purchased by the deceased spouse with community funds. In the *Slater* case, the Louisiana court found no testamentary intent implicit in the purchase of bonds in co-ownership form, and, finding no express agreement between the spouses to follow the survivorship provisions, held that the treasury regulations were for the government's convenience and not designed to deprive the deceased spouse of her community interest. As was pointed out above, the Washington court in the *Allen* case adopted the Louisiana view and rejected the Texas holding, in favor of the survivor, that the federal regulations were supreme. However, should a case arise in Washington involving the claim of the surviving non-purchasing spouse of co-ownership bonds, it is doubtful that the *Slater* case will be apposite, since it involved merely the interpretation of the treasury regulations, the Louisiana court not being confronted with a statute such as RCW 11.04.230.[23] It is clear that the Washington statutes regarding savings bonds were not enacted for the convenience of the federal government in making payments, but this is not tantamount to saying that they were intended to change the initial

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[18] RCW 11.04.050; RCW 26.16.030.

[19] Winsberg v. Winsberg, 220 La. 398, 56 So. 2d 730 (1952); Succession of Greagan, 212 La. 574, 33 So. 2d 118 (1947).

[20] The spouses may by agreement transmute community into separate property. RCW 26.16.050.

[21] *Supra* note 10.

[22] *Supra* note 6.

[23] *Supra* note 4.

character of ownership of the obligation. Their passage, following the decision in the *Decker* case, was obviously intended to recognize savings bonds as a valid will substitute and to give validity to the survivorship provisions.

It is to be pointed out that the statutes do not purport to deal with the initial character of ownership of the bonds, but only with their disposition upon the death of one of the parties thereto. Although one spouse cannot unilaterally transmut community into jointly held property, he may unilaterally dispose of his one half of the community interest upon his death. Thus, focussing on the contractural rather than the proprietary nature of U. S. Savings Bonds, the survivorship provisions of the Washington statutes may result in conclusively inferring the requisite testamentary intent in the deceased co-owner in favor of the surviving non-purchasing spouse. The same presumption would of course operate in the beneficiary bond area in favor of the non-purchasing spouse designated as beneficiary. Such a holding would in no way change the community nature of the bonds prior to the death of the purchasing spouse.

In summary, under the above analysis, where U. S. Savings Bonds are purchased with community funds, the possible factual situations that may arise and their probable disposition will be as follows:

Beneficiary Bonds. (1) Upon the death of the purchasing spouse, the surviving beneficiary spouse will take as sole and absolute owner. (2) Where the purchasing spouse names a stranger as beneficiary, the surviving spouse should be able to impose a constructive trust on the beneficiary for an amount equal to one half of the proceeds. (3) Where the purchasing spouse survives the beneficiary, the bonds will retain their community character. (4) Where the non-purchasing spouse is designated as registered owner and predeceases the purchaser beneficiary, a constructive trust of one half the proceeds may be imposed in favor of the estate of the deceased spouse in the absence of showing an agreement to follow the survivorship provisions.

Co-ownership Bonds. (1) Where the spouses are named as co-owners, the surviving non-purchasing spouse will take as sole owner. (2) Where the non-purchasing spouse predeceases the purchaser, a constructive trust of a one-half interest will be imposed in favor of the deceased's estate absent the showing of an agreement to the contrary. (3) Where a stranger to the community is named as co-owner, the non-purchasing spouse will be entitled to impose a constructive

trust on the surviving stranger for a one-half interest therein. (4) Co-ownership bonds purchased with community funds will retain their community character in absence of an agreement between the spouses to change the character of ownership.

TONI C. REMBE

Washington: Character of Property Acquired Under Installment Purchase Contract. The ubiquitous installment purchase contract, under which the vendor retains title pending payment of the purchase price, creates problems of analysis in the community property field as well as in other areas of the law. In the recent case of *Fritch v. Fritch*,[1] the Washington court held that land purchased during marriage under such a contract belonged to the community although prior to receiving a deed to the premises half of the payments were made out of the husband's separate funds. Before examining the exact factual pattern before the court in the *Fritch* case, some of the concepts involved in determining the community or separate character of ownership should be considered, as well as certain Washington cases applying these concepts to property purchased under installment purchase contracts.

Although all property acquired during marriage presumably belongs to the community,[2] a spouse may overcome this presumption by showing that the property was acquired either by gift, devise, descent, or with the rents, issues or profits of separate property.[3] The property acquired takes on the same character as the property used for its acquisition.[4] Because of the rule that the character of property is fixed at the "time of acquisition,"[5] the community or separate nature of the funds used or credit extended *at that time* would determine the character of ownership which is not affected by later payments made on the purchase price.[6]

[1] 53 Wn.2d 496, 335 P.2d 43 (1959).

[2] *In re* Sanderson's Estate, 118 Wash. 250, 203 Pac. 75 (1922); Conley v. Moe, 7 Wn.2d 355, 110 P.2d 172 (1941); Rawlings v. Heal, 11 Wash. 219, 190 Pac. 237 (1920); the presumption obtains whether title is taken in the name of the husband or wife. Patterson v. Bowes, 78 Wash. 476, 139 Pac. 225 (1914).

[3] RCW 26.16.010 and RCW 26.16.020 define separate property as property owned before marriage and that acquired after marriage by gift, devise, or descent, and the rents, issues and profits thereof. United States Fid. & Guar. Co. v. Lee, 58 Wash. 16, 107 Pac. 870 (1910); Chapman v. Bain, 117 Wash. 665, 202 Pac. 245 (1921); Rawlings v. Heal, *supra* note 2.

[4] *In re* Finn's Estate, 106 Wash. 137, 179 Pac. 103 (1919); Folsom v. Folsom, 106 Wash. 315, 179 Pac. 847 (1919); Woods v. Naimy, 69 F.2d 892 (9th Cir. 1934).

[5] *In re* Madsen's Estate, 48 Wn.2d 675, 296 P.2d 518 (1956); *In re* Witte's Estate, 21 Wn.2d 112, 150 P.2d 595 (1944); Sievers v. Sievers, 11 Wn.2d 446, 119 P.2d 668 (1942).

[6] *In re* Finn's Estate, 106 Wash. 137, 179 Pac. 103 (1919); *In re* Woodburn's Estate, 190 Wash. 141, 66 P.2d 1138 (1937).

In the case of an outright conveyance of real property upon a down payment with a mortgage back to secure the balance of the purchase price, the "time of acquisition" is easily fixed at the time the deed is executed. To characterize the nature of the property so acquired the nature of the funds used for the down payment and the obligation undertaken for the balance must first be determined.[7] If the down payment is made with separate funds and the grantor looks solely to the separate credit of one of the spouses for payment of the purchase price, the separate nature of the land is fixed when the deed is executed, even though community funds are later used to discharge the separate purchase obligation.[8]

However, in the case of an installment purchase contract under which the vendor retains title until the last payment is made, there has been some confusion in Washington as to the method of determining the character of property acquired. As has been pointed out, the exact point in time at which a thing is deemed to be acquired as well as the exact nature of the acquiring property are crucial in determining its separate or community character. Is the property deemed acquired when the contract is entered into, bit by bit as the payments are made, or when the deed is executed? Is the acquiring property the initial purchase obligation and contract right, the funds expended in making payments, or the last payment made when the deed was executed? The Washington court has tussled with these questions involving installment purchases in the following cases.

In re Kuhn's Estate[9] dealt with a land purchase contract entered into during marriage in which a down payment of one fourth the purchase price was made with community funds. Following the wife's death, the husband paid the balance of the purchase price and received a deed to the premises. The court held the realty to be the separate property of the husband, allowing the wife's estate to recoup an amount equal to one half of the original community down payment. The court fixed the "time of acquisition" at the time the deed was executed, and, reasoning from the proposition that an executory contract of sales creates no title, legal or equitable, in the vendee, held that the community had acquired no interest in the realty. The purchase contract was a community asset which could have been considered the source used in

[7] Bryant v. Stetson & Post Mill Co., 13 Wash. 692, 43 Pac. 931 (1894).
[8] *In re* Finn's Estate, *supra* note 6. For a discussion of the "time of acquisition" test as applied to various purchase transactions see Cross, *The Community Property Law in Washington*, 15 LA. L. REV. 315 (1955).
[9] 132 Wash. 678, 233 Pac. 293 (1925).

acquiring title.[10] Likewise, the pro-proprietary interest in the land might have been based on the source of funds used, as one fourth of the payments were made with community funds. However, due to the repudiation of the doctrine of equitable conversion[11] in prior cases, the court treated the contract interest as distinct from the title question. The property not having been acquired during marriage, recovery was limited to reimbursement for the deceased spouse's share of community payments at the time of her death.[12]

In a later case, *In re Binge's Estate*,[13] a dispute arose as to the community or separate character of land purchased under an installment purchase contract entered into by the husband when single, although the final payments were made and the deed executed after marriage. The opinion treated the subject of acquisition through installment payments at some length and announced the following rule:

> 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.*[14] [Emphasis added.]

At first blush, the rule as stated would appear to overrule the *Kuhn* case as to "time of acquisition" and thus obliterate the distinction between purchases under executory installment contracts and purchase money mortgages. The purchase obligation involved in the *Binge* case was clearly the separate obligation of the husband, he having contracted when single, but the above rule was not literally applied as the court went on to investigate the nature of the contract payments made in passing upon the extent of the community and separate interests in the property.

The court found the land to be the separate property of the husband not on the basis of the separate character of the purchase obligation but on the wife's failure to overcome the presumption that the separate obligation was paid out of separate funds.[15] The reason for

[10] In the case of Norman v. Levenhagen, 142 Wash. 372, 253 Pac. 113 (1927), the court recognized that an executory contract for the purchase of realty was personal property capable of community or separate ownership.

[11] Ashford v. Reese, 132 Wash. 649, 233 Pac. 29 (1925).

[12] The amount awarded could also have represented one half the value of the purchase contract at the time of death.

[13] 5 Wn.2d 446, 105 P.2d 689 (1940).

[14] *Id.* at 484.

[15] Where the husband has in his possession both community and separate funds, the presumption is that he pays debts from the fund from which properly they should be met. *In re* Finn's Estate, 106 Wash. 137, 179 Pac. 103 (1919).

the investigation into the payments made stemmed from a statement in the case to the effect that the community payment factor may make of the property something other than "rents, issues and profits" of separate property, although "when it is 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."[16]

The somewhat perplexing rule of the *Binge* case was again referred to by the court in the case of *In re Dougherty's Estate*[17] in which furniture was purchased under a conditional sales contract entered into by the wife before marriage, although the final payments were made and title acquired after marriage. After stating that the rule in the *Binge* case controlled and that property is acquired as of the time the obligation becomes binding, the court proceeded to prorate the proprietary interests therein according to the community or separate nature of the funds used in making payments, thus seemingly applying a source of funds test. The wife, having made community payments on the purchase price, a corresponding interest in the property was found to belong to the community.

The rule in most community property jurisdictions is that property purchased through installment payments partakes of the same character as the initial purchase obligation irrespective of the time legal title is actually acquired.[18] To the extent that funds from a different source are used in making payments, the property so purchased is frequently subjected to an equitable lien for reimbursement in favor of the community or the spouse out of whose funds such payments are made.[19] Although this rule appeared to be stated in the *Binge* case, the court indicated that it did not operate to fix irrevocably the entire proprietary nature of the property being purchased at the time of the contracting, but rather to create a presumption that the property so acquired would follow that of the initial contract interest. This contract interest is the acquired property which presumably retains its

[16] *In re* Binge's Estate, 5 Wn.2d 446, 485, 105 P.2d 689 (1940).

[17] 27 Wn.2d 11, 176 P.2d 335 (1947).

[18] See 1 DE FUNIAK, COMMUNITY PROPERTY § 64 (1948); Evans v. Ingram, 288 S.W. 494 (Tex.Civ.App. 1926); error refused; Commissioner v. King, 69 F.2d 639 (5th Cir. 1934); Laughlin v. Laughlin, 49 N.M. 20, 155 P.2d 1010 (1945). California, however, prorates ownership in accordance with the nature of the payments made. Vieux v. Vieux, 80 Cal. App. 222, 251 Pac. 640 (1926). This is the method used in Washington in determining ownership of life insurance policies.

[19] Baker v. Baker, 209 La. 1041, 26 So. 2d 132 (1946): The doctrine that the legal title may be subject to certain equities is recognized in Washington. Conley v. Moe, 7 Wn.2d 355, 110 P.2d 172 (1941); Legg v. Legg, 34 Wash. 132, 75 Pac. 130 (1904).

original community or separate nature in the absence of some "direct and positive evidence to the contrary."[20] Just what constitutes such evidence to the contrary is not entirely clear. The *Binge* case indicated that if the wife had shown that community payments were in fact made on the husband's separate purchase obligation, a corresponding community interest in the realty would have been found. In the *Dougherty* case the fact that the community payments made by the wife on her separate obligation were clearly traced and identified resulted in prorating ownership of the furniture acquired in accordance with the payments made. The payments in the above cases were made by the spouse initially owning the contract interest, and the question remains whether a mere identification of the source of funds used would overcome the presumption when payments are made without the consent of the owner of the initial contract interest.

The recent case of *Fritch v. Fritch*[21] indicated that the ability to show that separate funds were in fact used in making payments on an installment purchase contract initially belonging to the community will not necessarily operate to create a separate interest therein. The case involved a dispute over land undisposed of in a divorce decree. The land was purchased under an installment contract entered into during marriage, the deed having been placed in escrow pending payment of the purchase price. The husband paid the balance of the purchase price and received a deed to the premises about the same time as the entry of the interlocutory divorce decree and a year after the parties had separated dividing their household goods and other personal property. Twelve years after the final decree was entered, the land having substantially increased in value, the ex-wife asserted a claim to a one-half interest in the property as tenant in common. Although the court found that the husband paid one-half of the purchase price from his separate funds, it was held that the property belonged to the community at the time of the divorce although not disposed of by the final decree. In upholding the ex-wife's claim, however, the court impressed her interest in the land with an equitable lien for reimbursement of one half the purchase payments made from the husband's separate funds.

As the husband's principal argument in the above case was based on adverse possession, the exact basis for finding the disputed land to

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[20] See also Morse v. Johnson, 88 Wash. 57, 152 Pac. 677 (1915); Guye v. Guye, 63 Wash. 340, 115 Pac. 731 (1911).

[21] *Supra* note 1.

have belonged to the community is not set forth in the opinion. If the approach seemingly adopted in the *Binge* and *Dougherty* cases was followed, *i.e.*, that the fruit of the purchase contract partakes of the separate or community nature of the initial contract interest in the absence of clear and convincing evidence to the contrary, the holding indicates that some type of consent, actual or implied, of the contract owner is necessary to overcome this presumption. Thus a husband cannot unilaterally acquire a separate interest in a community contract by making payments thereon out of his separate funds.[22] This consent can be implied when, as in the *Binge* and *Dougherty* cases, the spouse making community payments on a separate contract is the owner of the initial contract interest. Likewise, community payments on a separate contract may be found to create interests therein if it can be shown there were no separate funds available.

The decision in the *Fritch* case could likewise furnish support for a future application of the rule stated, but apparently not followed, in the *Binge* and *Dougherty* cases, *i.e.*, that the character of property is fixed at the time the purchase obligation becomes binding. Such an approach would remove the distinction in Washington between property acquired through installment purchase contracts and purchase money mortgages.

Although the *Fritch* case would support both of the above methods of determining ownership of property acquired through installment payments, the holding clearly indicates a rejection of a strict "source of funds" approach suggested in the *Binge* and *Dougherty* cases and thus throws some light on a rather confusing area of Washington community property law.

TONI C. REMBE

[22] In the usual case it can be presumed that separate payments made by the husband on a community contract were intended as a gift to the community.