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THE STATUTORY COMMUNITY PROPERTY AGREEMENT AS A WILL SUBSTITUTE ON THE DEATH OF THE SECOND SPOUSE^o

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The statutory community property agreement is a unique¹ will substitute provided for by RCW 26.16.120.³ This statute allows a husband and wife to contract during their joint lifetimes for the vesting at death of their community property in the survivor without the necessity of an administration by the court. It applies only to agreements between husbands and wives to take effect "upon the death of either," and only to community property. However, most husbands and wives also contract as to the current character of their property and as to the character of property to be acquired in the future.³ Because such an agreement contains terms for characterization and disposition of present, future, and at-death prop-

^o This article is an excerpt from a forthcoming book by Professors Mark Reutlinger and William Oltman of the University of Puget Sound School of Law, to be published by Butterworths Legal Publishers and entitled, *Wills and Intestate Succession in Washington*. Copyright 1984 by the authors and Butterworth Legal Publications.

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1. *Reagh v. Dickey*, 183 Wash. 564, 48 P.2d 941 (1935).

2. WASH. REV. CODE 26.16.120 (1983), reads as follows:

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: *Provided, however,* That such agreement shall not derogate from the right of creditors, nor be construed to curtail the powers of the superior court to set aside or cancel such agreement for fraud or under some other recognized head of equity jurisdiction, at the suit of either party.

3. For a comprehensive form of community property agreement, see Mucklestone & Giles, *Washington Will and Trust Manual Services* § XVII (1979).

erty, it has been referred to as a "three-pronged" community property agreement.⁴

Only the at-death element is directly authorized by statute, and therefore, presumably only that element must meet the formal requirements for execution that are set forth in the statute. The other elements of the three-pronged agreement are simply an outgrowth of the general power of husbands and wives to agree as to the status of their property and to transfer property between themselves.⁵

While the statutory agreement has been used primarily for transfers between spouses upon the death of the first to die, there has been an increased utilization of the agreement as a means of transferring property to third parties without court-supervised administration upon the death of the second to die. Whether the transfer to third parties is legally possible and the analytical problems such a transfer presents will be the focus of this Article.

Property Covered

The statute provides for the disposition of the community property of husband and wife. Any separate property of the deceased spouse will pass pursuant to that spouse's will or by intestate succession. If the agreement by its terms also converts any separate property either spouse may have or acquire into community property, which is a non-statutory provision,⁶ then the decedent's share of such converted property will pass to the survivor under the agreement. However, the statutory agreement cannot pass separate property to the surviving spouse at death without first converting that separate property to community. In *In re Brown's Estate*,⁷ the agreement converted the separate property to community only *at the time of death*.⁸ The court did not comment

4. Cross, *The Community Property Law in Washington*, 49 WASH. L. REV. 729, 799 (1974).

5. WASH. REV. CODE 26.16.050 (1983); *Volz v. Zang*, 113 Wash. 378, 194 P. 409 (1920); *In re Brown's Estate*, 29 Wn. 2d 20, 185 P.2d 125 (1947); *In re Wittman's Estate*, 58 Wn. 2d 841, 365 P.2d 17 (1961).

6. See *supra* notes 2 and 5.

7. 29 Wn. 2d 20, 185 P.2d 125 (1947).

8. Leaving property as separate during the joint lives of husband and wife keeps the management of that property in the spouse who owns it and allows that spouse to give it away unilaterally, which would not be possible if there were an immediate conversion from

on the timing of the conversion, permitting the converted property to be disposed of under the statutory agreement; as the statute refers only to the *transfer* of community property at death, there is no direct restriction on a conversion of separate to community property also taking place at the time of death.⁹

RCW 26.16.120 also provides specifically that the agreement as to the disposition of community property upon the death of either spouse may apply to "the whole or any portion of the community property."¹⁰ Therefore, it is possible for husband and wife to agree on the status and disposition at death of a single community property asset (or any number of assets), leaving the remainder of the decedent's property to pass pursuant to some other dispositive scheme.

Interest Transferred

The statute does not define the type of interest that may be transferred.¹¹ It remains less than certain whether contingent interests or interests less than a fee may be transferred, or whether any interest may be transferred to a third party through the community property agreement.

Contingent Interests

The statute refers to a transfer "upon death".¹² Arguably any transfer that was contingent on some post-death event would necessarily take place sometime after death. The Washington Supreme Court in *In re Wahl's Estates*¹³ faced the question of survivorship as a contingency. In that case, husband and wife executed a community property agreement at the same time they executed codicils reaffirming their 10-year-old wills. Those wills contained survivorship clauses requiring the surviving spouse to survive 90 days in order to take under the will. The agreement contained no survivorship language. The husband died within 90 days of his wife; the trial court held that the community property agreement

separate to community property. WASH. REV. CODE 26.16.030(2).

9. See *supra* note 2.

10. *Id.*

11. *Id.*

12. *Id.*

13. 99 Wn. 2d 828, 664 P.2d 1250 (1983).

applied at death (passing the property through the husband's estate) and that there was no property remaining for the will to control. The supreme court remanded the case for a factual determination of whether the parties intended survivorship to be an implied term of the agreement. Implicit in the decision would seem to be a recognition of the right of husband and wife to transfer such a contingent interest by a statutory community property agreement. Whether that recognition would extend to other contingencies is as yet undetermined.

Less-Than-Fee Interest

The statute provides for agreements between spouses as to the "disposition of the whole or any portion of the community property then owned by them."¹⁴ That language clearly supports an agreement disposing of community property asset by asset. It also could be read, however, as permitting a less-than-fee interest, such as a life estate, in any or all assets, since such an interest is, in a property sense, a "portion" of the community property. That possibility finds some support in *In re Dunn's Estate*.¹⁵ The husband and wife had executed a rather complex community property agreement which was also denominated the last will and testament of each; in effect this was intended to be a joint and mutual will. After agreeing that all property owned or thereafter acquired was community, the parties agreed that the survivor could "use" and "dispose of" all the community property during his or her life; upon the death of the survivor, it was to pass into a trust for their children.¹⁶ In other words, the survivor received a life estate in the predeceasing spouse's interest in the community property, and the children received the remainder, which passed into trust (along with the survivor's share) upon the death of the survivor.

Following the death of the wife, the husband probated the agreement and paid inheritance taxes on the entire community property share of his wife (life estate and remainder). When the husband later died, the question arose as to how much inheritance tax was due. The supreme court held that the transfer of the *husband's* share of the property did not occur until the time of his

14. See *supra* note 2.

15. 31 Wn. 2d 512, 197 P.2d 606 (1948).

16. *Id.* at 514, 197 P.2d at 607.

death, and was therefore taxable. However, it seems to have been assumed that the transfer of the *wife's* complete interest (both life estate and remainder) took place at her death, since the husband paid taxes on it then and no attempt was made to tax it on the husband's death. If this means that the remainder passed to the children at the wife's death under the community property agreement, the case stands as some authority that a less than fee interest can be passed, and that it can be passed to a third party,¹⁷ by such an agreement.¹⁸

Unfortunately, the *Dunn* case does not lend itself easily to this interpretation. Since the instrument in question was also intended as a will and was probated as the wife's will, it is difficult to determine how much this holding tells about the transfer of a less than fee interest by community property agreement. The recognition of the transfer of the life estate from the wife could have been under the will as much as under the agreement. In fact, the former is more likely, considering that the instrument was probated. That *Dunn* stands for the proposition that the spouses may convey less than a fee interest by agreement, therefore, is far from clear.

Transfers to Third Parties.

Until 1983, the question of whether the community property agreement can be used to transfer property to a third party on the death of either the first or the second to die had never directly been considered by the court. The statute simply states that husband and wife may agree on the disposition of their community property "to take effect upon the death of either."¹⁹ There is no express limitation to transfers on the death of the first to die to the survivor. Furthermore, if the statute can be read to include *any* provision for a transfer on the death of the second to die, the property must by necessity pass to a third party.²⁰ There is no legislative history on the purpose of this statute, although it is gener-

17. See *infra* text accompanying notes 19-30.

18. This is the interpretation put on the case by Professor Cross. Cross, *The Community Property Law in Washington*, 49 WASH. L. REV. 729, 801 (1974).

19. See *supra* note 2.

20. This is not the same question as the passing of contingent or less-than-fee interests, *supra* text accompanying notes 12-18, although if there is a gift over or less than a fee is passed, the remaining interest must either stay with the transferor or pass to a third party. In the cases discussed, the ultimate disposition of the interest was not addressed.

ally assumed to intend the expeditious transfer of community property from one spouse to another upon the death of the first to die.²¹ In a general discussion of the purpose of the statute, the court in *McKnight v. McDonald*²² had stated that the effect of the statute's language "is to give the parties power to make community property, during life, the separate property of the survivor, after the death of either."²³ This implied a more limited role for the statute of simply conferring separate property on the surviving spouse.

In *In re Dunn's Estate*,²⁴ the agreement operated to give the surviving husband a life estate in the property passing from his wife, with the remainder of her interest apparently passing to their children at the time of the wife's death;²⁵ but as indicated above, since the agreement was probated, it is most plausible that the court was treating it as passing under the will. Also inconclusive was the earlier case of *Bartlett v. Bartlett*,²⁶ where the agreement gave to the survivor of a husband and wife a fee simple, and then in a later clause attempted to give whatever property remained upon the death of the survivor to their children. The court found that the second clause was an undue restraint on alienation of the fee simple already transferred; but it then went on to state that apart from the fee simple language, the parties had tried "to accomplish by contract what may be effected only by will,"²⁷ leaving the impression that for the agreement to pass property to third parties upon the death of the second to die, it must comply with the formal requirements for a will, as was the case in *Dunn*. On the other hand, in a later case the court noted that the agreement before it failed to provide for disposition of insurance proceeds in the event of simultaneous death of the spouses, implying that such a disposition (necessarily to third parties) could be made.²⁸

21. WASH. COMMUNITY PROPERTY DESKBOOK, § 38.2 (1977 and Supp. 1981).

22. 34 Wash. 98, 74 P. 1060 (1904).

23. *Id.* at 103, 74 P. 1061.

24. 31 Wn. 2d 512, 197 P.2d 606 (1948).

25. *See supra* text accompanying notes 14-18.

26. 183 Wash. 278, 48 P.2d 560 (1935).

27. *Id.* at 283, 48 P.2d at 562.

28. *In re Clise's Estates*, 64 Wn. 2d 320, 391 P.2d 547 (1964). An agreement like the one in *Bartlett* could be construed as a will contract which would pass a fee interest but bind the survivor as to its ultimate disposition. The court in *Bartlett* held without further comment that the agreement was not a contract to make a will, presumably due to the

In *Lyon v. Lyon*,²⁹ decided in 1983, a husband and wife had executed a valid community property agreement which converted all future acquisitions to community property upon receipt, and which vested all community property in the survivor upon the death of the first to die. Thereafter, the father of the husband died, devising some real property to the husband and the husband's brother as joint tenants with right of survivorship. When the husband died, the court was faced with the question of the proper distribution of the property held in joint tenancy. The court held that the community property agreement had created a joint tenancy between the brother and the community. This was accomplished without a severance, since there was no transfer, and the community itself became a joint tenant at the outset by virtue of the agreement. Upon the death of the husband the agreement controlled over the survivorship element of the joint tenancy, passing the husband's interest in the joint tenancy to the wife, severing the tenancy and leaving the wife and the brother as tenants in common.

In discussing the general policy favoring the community property agreements over conflicting methods of disposition, the court for the first time, albeit in dictum, acknowledged that such policy considerations would not be present if the agreement "[provided] for disposition of community property to other than the surviving spouse."³⁰

While a more definitive statement would be desirable, this dictum appears to set the matter at rest for the present, although an abundance of caution might dictate avoidance of such a provision until the law is further clarified.

Conclusion

It thus appears that the statutory community property agreement, although probably intended originally as a device merely to

spouse's apparent intent that the agreement act as the dispositive testamentary instrument itself, rather than as an agreement to make a will. However, there seems to be no reason why the parties could not combine a statutory community property agreement with a contract to make a will, the former governing the transfer at the first spouse's death, and the latter the transfer at the survivor's death.

29. 100 Wn. 2d 409, 670 P.2d 272 (1983).

30. *Id.* at 414, n.2, 670 P.2d at 275.

pass property from a predeceasing spouse to a surviving spouse on the death of the former, can be used as a will substitute to pass property to third parties on the death of either the first or the second spouse to die. Furthermore, there is support for a transfer of a less-than-fee interest in the property passing under the agreement. This interpretation renders the statutory agreement a far more flexible estate planning tool than it has generally been thought to be.