NATURAL RESOURCES JOURNAL

Volume 5
Issue 2 *Summer 1965*

Summer 1965

Husband and Wife—Damages—Community or Separate Property: Rutter v. Rutter, 74 N.M. 737, 398 P.2d (1965).

Ronald T. Taylor

HUSBAND AND WIFE—DAMAGES—COMMUNITY OR SEPARATE PROPERTY*—When a spouse in a community property state recovers a judgment that includes an itemized recovery for loss of future earnings and future medical expenses, are the amounts thus recovered community or separate property?

If the view is taken that the recovery is "earnings" of the spouse, it is clearly community property. If it is decided, however, that the recovery is really compensation for a personal injury to the spouse which is only *measured* by future earnings, then the award for loss of future earnings must be the separate property of the injured spouse. If itemized recoveries become more frequent, the community property states will have to determine the nature of compensation for loss of future earnings.

In *Rutter v. Rutter*,[1] the New Mexico Supreme Court left this important question of community property law unanswered. In *Rutter*, the husband plaintiff was recalled to military service in 1951. Prior to being sent overseas, he executed a general power of attorney appointing the defendant, his wife, attorney in fact. Under this power, the defendant was authorized to transfer personal and real property of any nature and to exercise general supervision and control over all of the plaintiff's property. Several months later the defendant joined the plaintiff overseas, and they remained together until their return to New Mexico in 1954.

In 1957, the plaintiff was seriously injured in a collision between his automobile and a truck belonging to the federal government. After hospitalization and medical treatment at home, the plaintiff was a patient in sanitariums in Texas and New Mexico, primarily for psychiatric treatment. In 1958, during the last period of treatment, the husband and wife filed suit under the Federal Tort Claims Act seeking damages for the injuries sustained as a result of the accident.

A judgment was obtained, but was later settled in October, 1960, for $295,744. Shortly therafter, the defendant visited the plaintiff at a sanitarium in New Mexico and obtained his endorsement on the settlement check. Before the settlement of the tort action, the defendant wife, alleging the plaintiff's mental incompetency, had successfully petitioned the district court to appoint her as head of the marital community.[2] On October 17, 1960, the defendant, act-

* Rutter v. Rutter, 74 N.M. 737, 398 P.2d 259 (1965).

1. 74 N.M. 737, 398 P.2d 259 (1965).

2. See N.M. Stat. Ann. § 57-4-5 (Repl. 1962).

ing under the authority of her designation as head of the marital community in February, 1960, and also under her 1951 appointment as the plaintiff's attorney in fact, created four irrevocable trusts with the balance of $198,000 remaining from the settlement. Under the disposition thus made, the plaintiff received $120,000 in trust; the defendant received $57,850 in trust; and their two children each received $10,075 in trust.

In June, 1961, the plaintiff revoked the 1951 power of attorney. He then brought suit to have the trusts declared void. The trial court found in favor of the defendant, holding that the power of attorney executed in 1951 remained in full force until its revocation in 1961. The court also held that the plaintiff was competent to act in his own behalf; that the plaintiff was never declared incompetent to manage his own affairs; that the defendant acted in good faith in setting up the four irrevocable trusts; and that the defendant had authority to act with respect to the community property under her appointment as head of the marital community.

On appeal to the Supreme Court of New Mexico, the plaintiff first contended that the power of attorney had expired long before the creation of the irrevocable trusts in 1960. Second, the plaintiff argued that if the power had terminated, the defendant could only act with respect to community property under her appointment as head of the marital community; and, third, that the money used to create the trusts was not community property, but was the plaintiff's separate property. The supreme court, *held*, Affirmed,[3] stating that if no time is specified for termination or expiration of the agency relationship, the authority to act under the relationship terminates at the end of a reasonable time,[4] and that the defendant had created the irrevocable trusts during a reasonable length of time after the creation of the power of attorney.

It is very possible that the court erroneously decided the issue relating to the power of attorney. First, the mental incompetency of the plaintiff, known to the defendant, should have been held to terminate the power of attorney, even though there had been no formal adjudication of incompetency.[5] Second, the defendant had no

3. Rutter v. Rutter, 74 N.M. 737, 743, 398 P.2d 259, 262 (1965).

4. *Id.* at 742, 398 P.2d at 261.

5. In construing the powers granted under a power of attorney, the principles of the law of agency are to be applied. Scott v. Hall, 177 Ore. 403, 163 P.2d 517 (1945). Restatement (Second), Agency § 134 (1958):

> [A] principal or agent has notice that authority to an act has terminated or is suspended if he knows, has reason to know, should know, or has been given

authority to deal with the judgment moneys in a transaction in which she herself stood to benefit (*i.e.*, the creation of the trusts) at the possible expense of the plaintiff.[6] Finally, and most important, it should have been apparent to the court that the long lapse of time, and the change of conditions from the time the power of attorney

---

a notification of the occurrence of an event from which the inference reasonably would be drawn:

* * * *

(c) by either, that the transaction has become impossible of execution because of incapacity of the parties, destruction of the subject matter, or illegality.

The trial court records show that at the time the trust agreements were set up, and before that time, it was the expressed opinion of the defendant that the plaintiff was not mentally capable of handling his business affairs, or capable of handling money. Record, pp. 218-219.

The defendant's only defense to the plaintiff's claim of incompetency and invalidity of any acts by the defendant after the accident was that the plaintiff was not legally declared incompetent. Several cases, however, in which there was no discussion or indication that the principal had been legally declared incompetent, still held the act of the agent void where he had acted with knowledge of the incapacity. Clark Car Co. v. Clark, 11 F.2d 814 (W.D. Pa. 1925); Merritt v. Merritt, 27 App. Div. 208, 50 N.Y. Supp. 604 (1898); Fischer v. Gorman, 65 S.D. 453, 274 N.W. 866 (1939). These authorities stand for the proposition that insanity, incompetency, or mental incapacity terminates the agency as a matter of law, even though there has been no actual adjudication of this condition. This should be the rule particularly when the agent has actual knowledge of his principal's condition, which was the case in *Rutter*. Perhaps the best reason for the rule is the fact that even though the principal acts through an agent, the law regards the act as having been done by the principal. If the principal is incapable, because of incompetency or mental incapacity, then the agent cannot act for him.

6. Every agency is subject to the legal limitation that it cannot be used for the benefit of the agent in the absence of an agreement to the contrary. See Colorado Fed. Sav. & Loan Ass'n v. Beery, 141 Colo. 45, 347 P.2d 146 (1959); Kamins v. Aetna Life Ins. Co., 258 Mich. 419, 242 N.W. 775 (1932). There was no such contrary agreement in *Rutter*; the defendant, *whatever her intent or motive*, acquired an interest in the subject matter of the purported agency. She and her children were the primary beneficiaries of trusts totaling $78,000, made up of what appears to be the personal property of the plaintiff.

Throughout the instrument granting the power of attorney, many specific powers were granted, followed by others that seem much broader in scope. These included the power to deal "generally" with the plaintiff's property. Record, pp. 34-35. At the time the power of attorney was executed, however, the parties did not contemplate that a broad, unrestricted agency had been created. The defendant herself testified that, except for creating the trusts in question, she performed only "ministerial acts" in utilizing the power of attorney. Record, pp. 225-26. In fact, the specified acts in the instrument restricted the defendant's authority to perform only in such a limited manner, because the specified powers in the instrument were, by themselves, a limitation on the use of the more general authority granted. Restatement (Second), Agency § 37 (1958): "(2) The specific authorization of particular acts tends to show that a more general authority is not intended." See also Clinton v. Hibb's Ex'rs, 202 Ky. 304, 259 S.W. 356 (1924).

was created, resulted in a termination of the agency simply because its purpose had failed.[7]

If the court had decided that the agency was terminated, then it would have had to decide whether the recovery for future earnings was community or separate property.

The plaintiff in *Rutter* sought to show that if the power of attorney would not support the defendant's right to set up the trusts, she could have acted only under the power she received by appointment as head of the community. If this had been the case, the defendant would have had control of only the *community* property.[8] The major issue, then, focuses upon what part of the Federal Tort Claims Act judgment, as settled by a supplemental decision, was community property.

In discussing this issue, the court concluded:

> [I]t makes no difference and we do not pass on whether all or any part of the proceeds of the judgment was separate or community property; if separate . . . [defendant] Rutter had as her authority the power of attorney herein held valid and in full force; if commu-

7. The power of attorney in *Rutter* was executed only because the plaintiff had been ordered to military duty overseas. The power was given for the purpose of permitting the defendant to act while the plaintiff was in military service, and, particularly, during the time of physical separation of the parties. It would not appear reasonable, therefore, for the defendant to believe that the plaintiff still intended for her to do the acts performed in dealing with the amount recovered, because of the lapse of time since execution of the power of attorney and the change in conditions giving rise to the creation of the power.

Restatement (Second), Agency § 108 (1958):

> (1) The authority of an agent terminates or is suspended when the agent has notice of the happening of an event or of a change in conditions from which he should reasonably infer that the principal does not consent to the further exercise of authority or would not consent if he knew the facts.

1 Mechem, Agency § 556 (2d ed. 1914), states that where there is an authority which could continue indefinitely, the only means of terminating this authority is not by accomplishment of the object; but that "known changes in conditions or values may be significant and perhaps conclusive. *The mere lapse of time may raise a presumption of termination . . .*" (Emphasis added.)

8. N.M. Stat. Ann. § 57-4-5 (Repl. 1962):

> Whenever the husband . . . is incapacitated to manage and administer the community property the wife may present a petition duly verified to the district court of the county wherein any of the community property is located or situated, stating the name of her husband, a description of all community property, both real and personal, and the facts which render him incapacited to manage and administer the community property and praying that she be substituted for her husband, as the head of said community, with the same power of managing, administering and disposing of the community property, as is vested in the husband by this chapter.

> nity, she had power to act under the decree designating her as head of the marital community.[9]

The fact is that very possibly the judgment was *not* community property; and if the power of attorney had expired, the head-of-community appointment could empower the defendant to act *only if* the judgment was community property.

The various elements of the plaintiff's damages were itemized in a supplemental decision on September 21, 1959, as follows: for pain and suffering, $15,000; for past loss of earnings, $25,000; for future loss of earnings, $12,500 per year for twenty-five years; for medical care and supervision, $6,000 per year for a period of thirty years.[10] The plaintiff conceded in his brief that the $25,000 awarded for past loss of earnings was a community loss, and was therefore community property.[11] The central issue arises with respect to the future loss of earnings and future medical expenses comprising the balance of the settlement in *Rutter*, totaling $198,000.

There is no direct authority on the status of future loss of earnings or future medical expenses. The reason seems to be that most personal injury cases have been tried before juries who return only general verdicts. The New Mexico statutes[12] dealing with community property and the husband's separate property appear, however, to provide an answer on their face. The husband's separate property is limited to the property he held before marriage, and that acquired after marriage by "gift, bequest, devise or descent."[13] Any other property belongs to the community.[14] Because money judgments received for an injury do not fall within the categories listed under the husband's separate property, it would appear that his money falls into the community as "other property." The settlement might also be classified as "proceeds from the productive faculty of the spouses" which have been declared to be one of the sources "from which the community estate must arise."[15] This line

9. Rutter v. Rutter, 74 N.M. 737, 742-43, 398 P.2d 259, 262 (1965).

10. Brief for Plaintiff, pp. 22-23, Rutter v. Rutter, *supra* note 9.

11. *Ibid.*

12. N.M. Stat. Ann. § 57-3-5 (Repl. 1962): "All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof is his separate property."

N.M. Stat. Ann. § 57-4-1 (Repl. 1962): "All other real and personal property acquired after marriage by either husband or wife, or both, is community property . . . ."

13. N.M. Stat. Ann. § 57-3-5 (Repl. 1962), quoted note 12 *supra*.

14. N.M. Stat. Ann. § 57-4-1 (Repl. 1962), quoted note 12 *supra*.

15. Hammonds v. Commissioner, 106 F.2d 420, 422 (10th Cir. 1939): "Indeed, the sole source from which the community estate must arise is the toil, talent, or other

of argument supports what the New Mexico Supreme Court recognizes as "the majority doctrine."[16] The supreme court, in *Soto v. Vandeventer*,[17] however, rejected this doctrine, stating: "If any writer has ever said a kind word for the majority holding, it has escaped our notice."[18]

In *Soto*, the supreme court said that the spouse's cause of action for personal injuries belongs to the spouse, and the funds obtained from the lawsuit for that loss were the separate property of the spouse. The court also said that moneys received in litigation as compensation or reimbursement for past medical expenses and past loss of earnings of the spouse are community property. There was no discussion of the status of a judgment for future loss of earnings or future medical expenses; but the theory of the court in *Soto* sets forth a method of analysis by which the status of such a judgment can be determined.

The supreme court in *Soto* based its finding that the compensation for the wife's injury was the property of the wife on the ground that

> she brought her body to the marriage and on its dissolution is entitled to take it away; she is similarly entitled to compensation from one who has wrongfully violated her *right to personal security*.[19]

The New Mexico court, therefore, considered the nature of the right involved, the nature of the losses, and who bears the losses in determining whether the proceeds of a personal injury judgment compensating for such losses are community or separate property. This method of analysis, based upon the nature of compensation, provides the major support for the contention that compensation, and more specifically, an award for loss of future earnings, is personal, and, therefore, not community property.

One authority deals with the nature of compensation for an injury in the area where, as in *Rutter*, there is a "single recovery" for a tort:

> What then is compensation? The primary notion is that of repairing plaintiff's injury or of making him whole as nearly as that may be

productive faculty of the spouse and the earnings and income from community property itself."

16. Soto v. Vandeventer, 56 N.M. 483, 494, 245 P.2d 826, 832 (1952). See also Annot., 35 A.L.R.2d 1199 (1954).

17. 56 N.M. 483, 245 P.2d 826 (1952).

18. *Id.* at 494, 245 P.2d at 832.

19. *Ibid.* (Emphasis added.)

> done by an award of money. . . . Sometimes this can be accomplished with a fair degree of accuracy. But obviously it cannot be done in anything but a figurative and essentially speculative way *for many of the consequences of personal injury. Yet it is the aim of the law to attain at least a 'rough correspondence between the amount awarded as damages and the extent of the suffering,' or other intangible loss.*[20]

It would appear that the trial court in *Rutter* awarded damages for future loss of earnings and future medical expenses to compensate for an "intangible loss": a disability or loss of capacity to earn. The court, by giving such an award, was apparently making a reasonable determination of the extent of the plaintiff's disability, a "consequence" of the personal injury. This is based on a consideration of his future needs, such as medical care, and the inability to work in the future to meet these expenses. Like the plaintiff's right to personal security in *Soto*, the plaintiff's injury in *Rutter*, loss of the capacity to work, then, was also personal.[21] According to this method of analysis, it is the plaintiff who will suffer economically from the injury and the loss; and most important, it is the plaintiff who is to bear the burden of the loss.

When faced with the problem of the status of an award for loss of future earnings, however, the courts will have to weigh the contrary argument that the wife must be entitled to a portion of the award because she has a community interest in the earnings of the husband. No one will dispute that the wife *may* suffer economic injury due to the husband's reduced earning capacity, and that the husband may ultimately be forced to contribute to her support out of the judgment moneys; but this fact in itself should not make the judgment moneys community property in the first instance, any more than other separate property of the husband should be declared to

20. 2 Harper & James, Torts § 25.1 at 1301 (1956). (Emphasis added.)

21. At the hearing on February 4, 1960, at which the defendant was appointed head of the community, she testified that: (1) the plaintiff suffered brain injury requiring his confinement and treatment in a sanitarium in Dallas; and (2) that at the sanitarium in Dallas, the authorities would not entrust the plaintiff with more than $2.00 when he was going out on some "little outing."

It was also introduced into evidence that the prior testimony of Dr. Speegle, a psychiatrist, was to the effect that: (1) the plaintiff was so lacking in memory and so unreliable he would never be employable again; (2) that he would need supervision and care for the rest of his life, and (3) that the doctor would not entrust to the plaintiff the job of delivering newspapers, nor did he think that the plaintiff was capable of doing simple janitorial work.

be community property simply because it is liable for the wife's support. The public policy requiring wives to be supported may be fulfilled if the judgment moneys are classed as community property in the first instance, but that public policy may not apply in certain cases; *e.g.*, when the wife has an adequate income of her own, or when the husband dies immediately after recovering the judgment. It should be apparent that the question of whether the future earnings are properly community or separate property is really one of title, and principles of community property law should not be perverted to reach a result supposedly dictated by a vague "public policy." Therefore, recoveries for lost future earnings should not be classed as community property simply because a feeling exists that such a classification will best serve a vague public policy demanding that provision be made for the wife.

In *Rutter*, it appears that the court calculated the probable loss of wages and medical expenses the plaintiff would incur, and awarded damages based on this determination. Part of the damages are based on the value of estimated earnings, but this does not mean that the damages are to take the place of present earnings which are community property.[22] In *Richards v. Richards*,[23] the New Mexico Supreme Court held that compensation payments that had already accrued were the separate property of the injured workman. The court reviewed the procedure for determining the amount of the payments which it said were awarded on the basis of disability, and not on the basis of lost wages. The court stated:

> The change in *disability* which is in fact injury, justifies the change in the award; increase or decrease in earning power is no longer the yardstick. We believe the change brings the case within the rule of Soto v. Vandeventer . . . and gives us additional reason for holding compensation payments are the separate property of the party injured.[24]

In New Mexico, therefore, payments for disability are not commu-

22. Mounsey v. Stahl, 62 N.M. 135, 306 P.2d 258 (1956).

23. 59 N.M. 308, 283 P.2d 881 (1955).

24. Richards v. Richards, 59 N.M. 308, 310, 283 P.2d 881, 882 (1955). See also Wood, Community Property Law of New Mexico § 61 (1954):

> The fact that compensation is measured by the current wages of the employee is not sufficient reason to conclude that they are in lieu of earnings. Compensation is also measured by the extent of the injury.

nity property, but rather they are the separate property of the party injured.[25]

To determine whether there had been a community loss or a private loss in *Soto v. Vandeventer*, the New Mexico Supreme Court tried to determine who had sustained the loss or damages, the individual or the community estate. This consideration superseded any technical definitions of the words "productive faculty"[26] and "property"[27] found in the community property statutes and cases. Under this analysis, it appears that the plaintiff in *Rutter* suffered the loss; and the damages for his future loss of earnings and medical expenses were therefore his separate property.

If this method of analysis of the damages in *Rutter* is correct, it is quite possible that the court would have reached another result if it had not made such general assumptions in deciding the case. The court's conclusion that the power of attorney had not expired, pri-

25. McKay, Community Property § 379 (2d ed. 1925), quoted in Soto v. Vandeventer, 56 N.M. 483, 491, 245 P.2d 826, 830-31 (1952):

> It may be urged that compensation is made by a transfer of property, and that the cause of action is potential or inchoate property. Conceded if you please, for the present, and what is the effect? You have not yet got rid of the fact that the cause of action takes its character as separate or common *from the primary right—the right to personal security, which right is individual*, and can not be held in common with another. Because it is individual it is also separate. It is separate not because of the classification made by the statute defining separate and common property, but by the legal principles outside those statutes, which antedate the statutes and were not repealed by them. [Emphasis added.]

The New Mexico Supreme Court, in Richards v. Richards, 59 N.M. 308, 311, 283 P.2d 881, 882 (1955), mentions the contrary view on the nature and character of workmen's compensation payments taken by De Funiak, Principles of Community Property § 68 (1943), but the court noted that the text relied upon decisions from Texas and California, distinguishable on the basis of the statutes of those states.

26. Hammonds v. Commissioner, 106 F.2d 420, 422 (10th Cir. 1939).

27. The court in Washington v. Washington, 47 Cal. 2d 249, 302 P.2d 569 (1956), used both the "productive faculty" test and the test which rests upon the principle that anything not declared separate property (*i.e.*, "other property") must be community property. The California court attempted to distinguish between

> damages that could reasonably be considered personal to the injured spouse such as those for pain, suffering, and disfigurement and damages properly belonging to the community such as those for loss of earning power, past and future medical expenses incurred or to be incurred, and disability of the injured spouse directly to contribute to the community venture.

302 P.2d at 571. The court, however, noted that the distinction was pure dictum because the case involved a general verdict; the court also cited an authority in support of this proposition which the New Mexico Supreme Court in *Soto* said could not be relied upon in light of New Mexico's different statutes. See comments on de Funiak, Principles of Community Property § 68 (1943), note 25 *supra*.

marily because it had not been used longer than a reasonable period of time, overlooked some equally important legal arguments in the area of agency which should have been considered more thoroughly. If the court had decided that the agency had terminated, it would have been forced to decide the community property issue. When this issue is squarely presented, it is to be hoped that the court will rule that an itemized recovery for loss of future earnings and for future medical expenses constitutes the separate property of the injured spouse.

RONALD T. TAYLOR