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COMMENTS

COMMUNITY PROPERTY—HUSBAND'S DUTY AND WIFE'S REMEDY IN SETTLEMENTS*

Under New Mexico law a husband may purchase, as an incident to separation or an action for divorce, all or part of a wife's interest in community property.¹ But because of the confidential relationship of husband and wife, and the supposed dominant influence of the husband, such transactions are presumptively fraudulent,² and special duties are imposed on the husband if a conveyance is to be effective. The purpose of this Comment is to discuss the efficacy of the recent decision in *Trujillo v. Padilla*³ delineating the scope and limitations of the wife's remedies where the husband has wrongfully acquired her interest in community property.⁴

The husband's duties in a conveyance of community property from wife to husband are derived, by judicial construction, from N.M. Stat. Ann. § 57-2-6, which provides that these conveyances are subject "to the general rules of common law which control the actions of persons occupying confidential relations with each other."⁵ Section 57-2-6 creates a fiduciary⁶ relationship between husband and wife;⁷ "the parties stand toward each other as trustee and beneficiary, the husband being the trustee, and the wife the cestui que trust, and upon this basis [the courts] determine the validity of the contracts and deeds in question."⁸ This relationship renders the husband's purchase of the wife's interest in community property presumptively

* *Trujillo v. Padilla*, 79 N.M. 245, 442 P.2d 203 (1968).

1. N.M. Stat. Ann. § 57-2-12 (1953); see also Clark, *Transmutations in New Mexico Community Property Law*, 24 Rocky Mountain L. Rev. 273 (1952).

2. N.M. Stat. Ann. § 57-2-6 (1953); *Beals v. Ares*, 25 N.M. 459, 185 Pac. 780 (1919); *Curtis v. Curtis*, 56 N.M. 695, 248 P.2d 683 (1952).

3. 79 N.M. 245, 442 P.2d 203 (1968).

4. A detailed discussion of conveyances from husband to wife is beyond the scope of this Comment. Because the common law views the husband as the stronger and dominating member of a marriage union, a conveyance from husband to wife is presumed to be a gift for her support, and it is valid in equity unless it is in fraud of creditors. But in a transaction where the wife has obtained such an advantage over the husband so as to confuse his judgment and control his will, equity will grant relief to the husband. See *Trigg v. Trigg*, 37 N.M. 296, 22 P.2d. 119 (1933) where "nagging" was sufficient undue influence to void a deed of community property from husband to wife.

5. N.M. Stat. Ann. § 57-2-6 (1953). This provision was taken from a California statute and is identical with it, except the words, "as defined by the title on trusts," appear at the end of the California provision. West. Cal. Civ. Code § 158 (West 1954).

6. See Hancock, *Fallacy of the Transplanted Category*, 37 Can. B. Rev. 535 (1959). Also see 14 Stan. L. Rev. 587 n.20 (1962) for a discussion of the dangers involved in transplanting the word fiduciary into the context of community property.

7. *Primus v. Clark*, 48 N.M. 240, 243, 149 P.2d 535, 537 (1944).

8. *Beals v. Ares*, 25 N.M. 459, 473, 185 P. 780, 794 (1919).

fraudulent, and the duty devolves upon the husband to show, "(a) the payment of an adequate consideration, (b) full disclosure by him as to the rights of the wife and the value and extent of the community property and (c) that the wife had competent and independent advice in conferring the benefits upon her husband."⁹

If the conveyance is fraudulent the basic form of the wife's remedy is simply stated, simply understood, and simply justified. "The cancellation of the deed and contract is the gravamen of the action. Should they be cancelled it [follows] as a matter of law that the plaintiff [is] entitled to a decree awarding her an undivided one-half interest in the community property."¹⁰ Through this remedy the husband is neither unjustly enriched nor unjustly deprived. The difficulties presented by the wife's remedy do not arise out of the form of her remedy, but out of the attempt to determine when the exercise of her remedy is, or should be, barred by the New Mexico courts.

The leading case delineating the scope of the wife's remedy is the recent case of *Trujillo v. Padilla*.¹¹ The husband, prior to divorce, received a conveyance of the wife's interest in community real property. Ten years and one month after her execution of a warranty deed, the wife sought declaratory judgment to set aside the deed on grounds that, by reason of the husband's failure to perform his fiduciary duties, the conveyance was constructively fraudulent. The deceased husband's successors in interest argued that the wife's ac-

9. *Id.* at 475, 185 Pac. at 796. J. Wood, *The Community Property Law of New Mexico* § 35 (1954) states:

The general rules of common law applying to confidential relations are that the transaction must be fair and reasonable, that the parties know all of the relevant facts, know of their legal rights and in light of such knowledge assent to the transaction, and that the transaction is not fraudulent or the result of undue influence. *Primus v. Clark*, 48 N.M. 240, 149 P.2d 535 (1944); *Trigg v. Trigg*, 37 N.M. 296, 22 P.2d 119 (1933); *Beals v. Ares*, *supra*.

This is simply a more general statement of the "rules of common law" from which the specific enumeration of the husband's duties quoted in the text is derived. The actual test used by the courts to determine whether the husband has performed his duties is the one quoted in the text.

In *Beals v. Ares*, *supra* note 8 at 473, 185 P. at 794, *followed in* *Curtis v. Curtis*, 56 N.M. 695, 248 P. 2d 683 (1952) the court considered the question of the strictness with which these enumerated duties should be interpreted and applied. The court adopted the rule announced by the California Supreme Court in *White v. Warren*, 120 Cal. 322, 49 P. 129, 52 P. 723 (1897): "It is *only* in those transactions where one [spouse] secures an advantage over the other that the confidential relation existing between them may be invoked" (emphasis added). This statement apparently indicates that the court will not require the husband to strictly perform his fiduciary duties whether their performance is necessary for the wife's protection or not, but rather will look to whether the husband actually exploited an advantage over his wife through which he was unjustly enriched. For a more complete discussion of the husband's fiduciary duties in voluntary settlements see 14 Stan. L. Rev. 587 (1962).

10. *Primus v. Clark*, *supra* note 7 at 245, 14 P.2d at 540.

11. *Trujillo v. Padilla*, *supra* note 4.

tion should be barred by N.M. Stat. Ann. § 23-1-4 which places a four year limitations period on actions brought for relief on ground of fraud.¹² The court, unconvinced by this argument, held that under the circumstances of this case fraud was only incidental to the cause of action and therefore the statute was not applicable.

The logical grounds for this holding are dubious, and the weaknesses are effectively exposed by Justice Moise in his dissenting opinion. First, Justice Moise points out the majority's error in relying on *Lotspeich v. Dean*¹³ as authority for the proposition that in the circumstances of this case fraud was only incidental to the cause of action:

They held, if I understand the opinion correctly, that the four-year statute of limitations, applicable to actions seeking relief on the ground of fraud . . . may not be invoked when the action is between husband and wife. They do this by asserting that fraud is only incidental or collateral to the cause of action, and cite and quote from *Lotspeich v. Dean*. . . . However, that case merely held that no title could pass by a forged deed, and that failure to sue and assert fraud within the statutory four-year period could not result in making the void deed effective to pass title. The fraud was clearly only incidental. Here the question arises not because the deed was void but, rather, out of the conduct of the grantee—admittedly fraudulent.

. . . The action is one based entirely on fraud—constructive true—but fraud, nevertheless. Indeed, the majority recognize it when they say "*the primary and principal questions are (a) whether the conveyance was fraudulent and (b) was the appellant's cause of action barred by the statute of limitations.*" How does the latter statement that "fraud is only an incident to the cause of action" coincide with this? How can it be only an incident and still be the principal question?¹⁴

Justice Moise then supports the proposition that New Mexico's four-year statute of limitations on actions for relief on ground of fraud should apply to the circumstances of *Trujillo v. Padilla*. He points out that *Beals v. Ares* held that in these circumstances the husband is in the position of a trustee and the wife that of a beneficiary,¹⁵ thus the wife's remedy is essentially a declaration of a con-

12. N.M. Stat. Ann. § 23-1-1 (1953) provides: "The following suits or actions may be brought within the time hereinafter limited, respectively, after their causes accrue, and not afterwards, except when otherwise specifically provided." N.M. Stat. Ann. § 23-1-4 (1953) provides: "Those founded upon accounts and unwritten contracts; those brought for injuries to property or for the conversion of personal property or for relief upon the ground of fraud, and all other actions not herein otherwise provided for and specified within [4] years."

13. *Lotspeich v. Dean*, 58 N.M. 488, 211 P.2d 979 (1949).

14. *Trujillo v. Padilla*, *supra* note 4 at 249, 250, 442 P.2d at 207, 208.

15. *Beals v. Ares*, *supra* note 8.

structive trust. Justice Moise then refers to *Patterson v. Hewitt* for the holding that Section 23-1-4 includes equitable actions,¹⁶ and to *Regan v. Brown* for the holding that Section 23-1-4 includes actions on constructive trust.¹⁷ Not only should the wife's action be barred by Section 23-1-4 because it is essentially seeking relief on ground of fraud, but it must be barred to be consistent with prior New Mexico decisions.¹⁸

Logic is the touchstone of Anglo-American jurisprudence, but courts are also concerned with policy. As significant as the logical weaknesses of the *Trujillo* case are, it is the social policy implications of the case which most necessitate this discussion.

The application of a statute of limitations may be difficult to justify since often its function is to arbitrarily bar a rightful cause of action merely because time has passed. Superficially the policy implications of the *Trujillo* case indicate that the wife's interest in community property should be protected from this arbitrary bar. After all, who can say when a wife should actually realize that she has been taken advantage of in her dealings with her husband; and once a wife is aware she has been taken advantage of, who can say when she should realize that she has an enforceable remedy?¹⁹

Statutes of limitations, however, are not devoid of merit; there are four basic justifications for statutes of limitations. A close examination of how each of these justifications relates to the circumstances of the *Trujillo* case reveals that not only should Section 23-1-4 logically bar the wife's action but it should bar the wife's action as a matter of public policy.

The first justification of limitations is based on the traditional no-

16. *Patterson v. Hewitt*, 11 N.M. 1, 66 P. 552, 55 L.R.A. 658 (1901), *aff'd* 195 U.S. 309 (1904).

17. *Regan v. Brown*, 59 N.M. 423, 285 P.2d 789 (1955).

18. It could also be argued that the language, "and all other actions not herein otherwise provided for and specified within four (4) years," N.M. Stat. Ann. § 23-1-4 (1953), is broad enough to include the wife's equity action.

19. In New Mexico it is the policy of the law to prevent litigation between husband and wife; therefore the statute of limitations or laches do not run against parties while they continue in a marital relation. *Curtis v. Curtis*, 56 N.M. 695, 248 P.2d 683 (1952). Thus it would be unnecessary for the wife to realize that she has a valid cause of action until after she is divorced.

Bogert, *The Law of Trusts and Trustees* 953 (2nd ed. 1962) states:

If the reason that equity will decree a constructive trust is that the title to property has been wrongfully *acquired*, then a cause of action for its recovery immediately accrues, without need for a repudiation of the obligation by the title-holder, and the Statute of Limitations should begin to run at once, against the injured party, assuming that he is competent and has actual or imputed notice.

For a general discussion of the problem of when statutes of limitations begin to run against causes of actions see 9 W. Res. L. Rev. 86.

tion that the inactivity of the person wronged may constitute acquiescence to the wrongdoer's breach of duty.²⁰ This is relevant to the circumstances of the *Trujillo* case. Divorces are specifically designed to accomodate spouses who wish to disassociate themselves. A wife desiring to perfect her disassociation might avoid entangling herself in a lawsuit with her ex-husband even at the cost of a reasonably substantial loss to her interest in community property.

The second justification of limitations is based on the equity notion that there is probably a defect in a stale claim and such claim should be barred to prevent fraud.²¹ A wife having a well founded claim will probably not delay enforcing it beyond a reasonable time, if, indeed, she has the power to sue.²²

The third justification of limitations is based on the sufficiency of evidence needed to prove a claim.²³ As time passes witnesses to an event become unavailable and memories fade. This is an especially significant policy consideration in the circumstances of the *Trujillo* case. To perfect a prima facie case the wife need only (a) show that, as an incident to separation or divorce, she voluntarily transferred her interest in community property to her husband and (b) assert that the husband, because he failed to perform his fiduciary duties, wrongfully acquired her interest in community property. Sufficient evidence to support the wife's case, such as a recorded deed, will most likely be almost permanently accessible. On the other hand, to overcome the presumption of fraud raised by the wife's prima facie case, the husband must prove (a) that he gave adequate consideration for the wife's interest, (b) that he fully disclosed the value and extent of the community property and the wife's rights therein, and (c) that the wife had independent advice. These elements are not as easily proved as those of the wife, and they become less and less susceptible to proof as witnesses become unavailable and memories fade. Concerning the sufficiency of evidence necessary to prove essential facts, the passing of time is an inequitable advantage to the wife.

The fourth justification is based on public policy favoring repose.²⁴ A potential defendant's protection from protracted fear of litigation is the most substantial justification for imposing a statute of limitations. The *Trujillo* decision, by eliminating repose over property

20. *Woolsey v. Trimble*, 18 F.2d 908 (6th Cir. 1927) (dictum).

21. *Williams v. Village of Port Chester*, 76 N.Y.S. 631, 72 App. Div. 505 (1902).

22. Of course, if there are valid grounds for the wife's delay the running of the statute may be tolled. There was some evidence in the *Trujillo* case that the wife was prevented from suing earlier because she was under duress.

23. *Davis v. Munie*, 235 Ill. 620, 85 N.E. 943 (1908).

24. *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553 (2nd Cir. 1962).

settlements, not only places the husband in protracted fear of an opportunistic or vindictive wife but creates a problem concerning marketability of title to real property.

The New Mexico Supreme Court has defined marketable title as: ". . . a title not subject to such reasonable doubt as would create a just apprehension of its validity in the mind of a reasonable, prudent, and intelligent person; one that a person of reasonable prudence and intelligence, guided by competent legal advice, would be willing to take and pay the fair value of the land for."²⁵ Until a vendor shows otherwise, the title to his real property is presumptively subject to a community interest in his wife, and this presumption could be "such reasonable doubt" as renders a title unmarketable.²⁶ Because conveyances from wife to husband are voidable by the wife, a vendor's proof that he received his wife's community interest in a voluntary property settlement does not eliminate a reasonable belief that the property is *still* subject to a community interest in the wife. Thus the vendor's title could be unmarketable so long as it is voidable by the wife. Since the four-year statute of limitations on actions for relief on ground of fraud does not bar the wife's action, the vendor's title may be permanently unmarketable. What can a husband do to be certain that the property he acquires in a settlement will have a marketable title?²⁷

Probably the husband's surest way of acquiring a marketable title is to not settle with his wife at all, but in connection with the divorce action sue for a division of community property.²⁸ There is no presumption of fraud on property divisions by the courts, which would be *res judicata* as to the rights of the parties in a wife's subsequent independent action to void such a division.²⁹ This solution, however, is inadequate because it ignores the husband's desire to negotiate a voluntary settlement,³⁰ and because attorney's fees and court costs

25. *Cambell v. Doherty*, 53 N.M. 280, 283, P.2d 1145, 1148 (1949).

26. This presumption also puts a subsequent purchaser on sufficient notice of a possible outstanding interest to eliminate his status as a bona fide purchaser. C. Flick, 2 Abstract and Title Practice §§ 1091-1099 (1958).

27. For a discussion of the curative effect of statutes of limitations on titles see R. Patton and C. Patton, 1 Patton on Land Titles § 84 (1957). The reader should note that any cures the husband has for a title defect are equally cures for the more general problem of repose.

28. In New Mexico the husband can institute a suit for division of property without divorce, N.M. Stat. Ann. § 22-7-2 (1953), at divorce, N.M. Stat. Ann. § 22-7-6 (1953), or subsequent to divorce, N.M. Stat. Ann. § 22-7-22 (1953).

29. In New Mexico, so long as the complaint in the divorce suit does not invoke the jurisdiction of the court as to the property rights of the spouses, the divorce decree does not preclude an independent action to set aside, on ground of constructive fraud, a property settlement approved by the decree. *Beals v. Ares*, *supra* note 8.

30. The apparent legislative intent to encourage voluntary marriage settlements is expressed in N.M. Stat. Ann. § 57-2-12 (1953).

involved are expensive. Similarly, if subsequent to his acquisition of his wife's interest the husband wishes to perfect the marketability of his title he may do so by instituting a quiet title suit.³¹ However, in addition to the difficulties and expenses involved, this solution too ignores the husband's desire for a voluntary private settlement.

Next, the husband might consider the possibility of perfecting a marketable title by either obtaining a release from his wife concurrently with his acquisition of her community interest, or by obtaining a ratification or a quit claim deed from his wife subsequent to the divorce and acquisition of her community interest. But neither of these solutions is adequate to overcome the presumption that there is an outstanding community interest in the wife. A release, no matter how concrete, is still subject to the same presumption of fraud as the transaction of which it is a part. A ratification and a quit claim deed, although obtained after divorce, are still subject to the same presumption of fraud as the original transaction.³² Since a husband is most likely to defraud his wife after trust and confidence have left their relationship, the duties imposed on the husband by N.M. Stat. Ann. § 57-2-6 are operative regardless of the actual extent of the trust and confidence placed by one spouse in the other.³³ Thus any acquisition by the husband of his wife's community interest is presumptively fraudulent, regardless of whether the spouses are still married.

The last possibility of perfecting a marketable title which the husband might consider is the existence of legal bars to the wife's action other than the four-year statute of limitations on actions grounded on fraud. But apparently there are no such bars to the wife's action in New Mexico. In addition to arguing that the wife's action should be barred by the four-year limitation on fraud actions, the husband's successors in interest in the *Trujillo* case argued that the wife's action should be barred by New Mexico's ten year adverse possession statute.³⁴ The court, however, disagreed, holding that the "failure of appellees to overcome the presumption of fraud in acquiring the title [prevented] them from meeting the good faith requirement of the statute."³⁵ A husband's successors in interest could also argue that N.M. Stat. Ann. § 31-8-3, bars a wife's claim against his estate, if

31. N.M. Stat. Ann. § 22-14-1 (1953).

32. *Curtis v. Curtis*, 56 N.M. 695, 248 P.2d 683 (1952) is in point concerning ratification.

33. *Primus v. Clark*, *supra* note 7, held that a husband's fiduciary duties are not destroyed by an action for divorce.

34. N.M. Stat. Ann. § 23-1-22 (1953).

35. *Trujillo v. Padilla*, *supra* note 4 at 248, 442 P.2d at 206. The correctness of this holding is subject to doubt. However, a discussion of the issue is beyond the scope of this comment.

his estate was probated and the wife did not file her claim with the clerk of the probate court "within six months from the date of the first publication of notice of the appointment of the executor or administrator."³⁶ The New Mexico Supreme Court has held that Section 31-8-3 applies to claims based on contract but does not apply to tort claims.³⁷ It has never been decided whether Section 31-8-3 would bar a wife's claim to a community interest in her husband's estate. However, the doubt surrounding the issue does indicate that Section 31-8-3 will not operate to cure the defect in the husband's title.³⁸

There are only two ways in which a husband can convey a marketable title to property he acquired in a voluntary settlement with his wife: (a) by getting a judicial determination of his property rights, or (b) by having his wife join in his conveyance to a subsequent purchaser. Neither of these is satisfactory. The first is difficult, expensive and nullifies the husband's desire for a voluntary settlement. The second reduces the value of the property to the husband and presents difficulties concerning the availability and willingness of the wife or her successors in interest.

The sufficient repose for a marketable title will never settle over a husband's title to property in which he acquired his wife's community interest through a voluntary settlement. Fortunately, a husband, to gain some relief from his protracted fear of having his settlement voided, still has the possibility of asserting an equity bar to his wife's cause of action. The husband's successors in interest also argued in the *Trujillo* case that the wife's claim should be barred by her laches. The court held that, "[l]aches is an equitable defense and, unlike limitations, is not necessarily a matter of time, but is a question of the inequity of permitting the claim to be enforced. . . . No inequities caused by any delay of appellant are shown in the record."³⁹ Apparently, the courts are willing to listen to a husband's equity argument, but, when weighing the inequities involved, they will place heavy emphasis on protecting the wife's interest.⁴⁰

The apparent purpose of the New Mexico Legislature in sub-

36. N.M. Stat. Ann. § 31-8-3 (1953).

37. *Frei v. Brownlee*, 56 N.M. 677, 248 P.2d 671 (1952).

38. Another possible legal bar is the argument that the wife's cause of action does not survive her death. But this argument is specious since once the community property is divided, the property so divided becomes the separate property of the respective spouses. *Harper v. Harper*, 54 N.M. 194, 217 P.2d 857 (1950). Thus the husband who acquires his wife's interest in community property fraudulently simply holds this interest as a constructive trustee of the wife's separate property. Certainly the wife's interest is vested and inheritable.

39. *Trujillo v. Padillo*, *supra* note 4 at 249, 442 P.2d at 207.

40. This statement probably applies equally to other possible equity defenses of the husband such as waiver or estoppel; however, there are no New Mexico cases in point.

jecting voluntary property settlements to "the general rules of common law which control the actions of persons occupying confidential relations with each other"⁴¹ was to protect the wife from the unfair advantage of the husband. Unfortunately, the New Mexico Supreme Court in its implementation of this intent has virtually ignored the rights of the husband. As a result the husband, to be certain of the finality of his settlement and the marketability of his interest in the settlement, must bear the expense of a judicial determination of his property rights. There are two ways to effectively remedy this situation. First, the New Mexico Supreme Court in subsequent cases may reverse its decision in *Trujillo* by adopting Justice Moise's dissenting opinion. Second, because years may pass before the New Mexico Supreme Court reviews a case in which it can reverse its decision in *Trujillo*, the New Mexico Legislature should amend its four-year statute of limitations on actions brought for relief on ground of fraud to specifically include presumptive or constructive fraud in marital property settlement cases.

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41. N.M. Stat. Ann. § 57-2-6 (1953).