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COMMUNITY PROPERTY—HUSBAND'S USE OF COMMUNITY FUNDS TO ENTER JOINT TENANCY WITH THIRD PARTY*

The New Mexico community property statute gives the husband the management and control and the sole power of disposition of the personal property of the community.[1] The same statute has also been interpreted as raising the presumption that all property acquired by the husband or wife, or both, after marriage is community property.[2] The problems involved in the application and interpretation of these statutory provisions have been the subject of considerable discussion by the courts[3] and commentators.[4] It is the purpose of this Comment to examine a problem which has so far escaped detailed treatment by commentators,[5] but which could easily arise in New Mexico: What are the consequences when a husband uses community funds to enter a joint tenancy with a third party?

In *Thaxton v. Thaxton*,[6] a husband and his father contributed equal amounts toward the purchase of United States Savings Bonds. The husband's contribution was made with community funds. He and his father held the bonds as co-owners with rights of survivorship as provided in the federal treasury regulations.[7] Upon the father's death the bonds passed to the husband. Two years after the father's death

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* Thaxton v. Thaxton, 405 P.2d 932 (N.M. 1965).

1. N.M. Stat. Ann. § 57-4-3 (1953).

2. N.M. Stat. Ann § 57-4-1 (1953). The applicable language provides:

> All other real and personal property acquired after marriage by either husband or wife, or both, is community property; but whenever any real or personal property, or any interest therein or encumbrance thereon is acquired by a married woman by an instrument in writing the presumption is that title is thereby vested in her as separate property. . . .

The presumption in New Mexico is that all property acquired after marriage, except by gift, devise, or descent, is community property. See, *e.g.*, Campbell v. Campbell, 62 N.M. 330, 310 P.2d 266 (1957); Katson v. Katson, 43 N.M. 214, 89 P.2d 524 (1939); *In re* Faulkner's Estate, 35 N.M. 125, 290 Pac. 801 (1930). See generally Clark, *Presumptions In New Mexico Community Property Law: The California Influence*, 25 So. Cal. L. Rev. 149 (1952).

3. *E.g.*, Hernandez v. Becker, 54 F.2d 542 (10th Cir. 1931); Primus v. Clark, 48 N.M. 240, 149 P.2d 535 (1944); Beals v. Ares, 25 N.M. 459, 185 Pac. 780 (1919).

4. Clark, *New Mexico Community Property Law: The Senate Interim Committee Report*, 15 La. L. Rev. 571 (1955); Wood, The Community Property Law of New Mexico § 20 (1954).

5. The problem is mentioned briefly in Clark, Community of Property and the Family in New Mexico 19 (1956), and is considered in Comment, 25 So. Cal. L. Rev. 354 (1952).

6. 405 P.2d 932 (N.M. 1965).

7. 31 C.F.R. § 315.7 (1965). This regulation provides that United States Savings Bonds may be acquired by one person as sole owner, by two persons as co-owners, or by one person with a named beneficiary.

the wife brought a divorce action and claimed a one-fourth interest in the bonds. The trial court awarded the wife a one-fourth interest in the bonds on the ground that the award represented her "vested interest" in the community property contributed by the husband toward the purchase of the bonds.[8] On appeal, *held*, Affirmed.[9] The husband argued that the bonds were his separate property by virtue of the federal treasury regulations relating to the survivorship provisions in the bonds at the time of purchase.[10] The New Mexico Supreme Court construed the treasury regulations as not applicable to property settlements ordered pursuant to a decree of divorce.[11]

While the court in *Thaxton* did not reach the issue concerning the husband's use of community funds to enter a joint tenancy with a third party, the effect of *Thaxton* has ramifications beyond the unique situation involving government bonds.[12] The significant factor in the *Thaxton* case was that the wife's claim was only for a one-fourth interest in the bonds. It is unfortunate that the court was not presented with a claim for a one-half interest in the bonds, representing the wife's interest in the property of the community. Had that question been put before the court a decision could not have been rendered in *Thaxton* without a judicial determination concerning the conse-

8. Record, p. 17, Thaxton v. Thaxton, 405 P.2d 932 (N.M. 1965). The wife was awarded an additional one-fourth interest in the bonds as a substitute for cash alimony payments that were to cease after a specified date. *Ibid.*

9. 405 P.2d at 937.

10. 31 C.F.R. § 315.62 (1965). This regulation provides that the co-owner of a savings bond who survives the other co-owner will be recognized as the sole and absolute owner of the bond. The husband in *Thaxton* cited the United States Supreme Court case of Free v. Bland, 369 U.S. 663 (1961). Brief for Appellant, pp. 18-22. In *Free*, the husband used community funds to acquire government bonds. The bonds were issued to the husband and wife as co-owners. Upon the wife's death her heirs claimed an interest in the bonds under the Texas community property statute. The Supreme Court awarded the bonds to the husband, holding that the treasury regulations have the force and effect of federal law and as such prevailed over Texas community property law. The *Free* decision was modified in Yiatchos v. Yiatchos, 376 U.S. 306 (1964), in which the Supreme Court held that the federal survivorship provisions could not be enforced against a wife if the husband in using community funds to acquire the bonds had acted in fraud of his wife's interest in the property of the community. For an analysis of the *Free* and *Yiatchos* decisions, see Comment, 25 La. L. Rev. 108 (1964).

In *Thaxton*, the New Mexico Supreme Court distinguished the Supreme Court decisions in *Free* and *Yiatchos*, and said that the Supreme Court precedents did not control. See note 11 *infra*.

11. 405 P.2d at 936. The court in *Thaxton* based its decision upon its interpretation of 31 C.F.R. § 315.22 (1965). This regulation provides that a decree of divorce settling the respective interests of the parties in a bond is not in conflict with 31 C.F.R. § 315.20 (1965), which prohibits any judicial determination that would defeat or impair the rights of survivorship conferred by the treasury regulations. *Ibid.*

12. See note 11 *supra* and accompanying text.

quences of a husband's use of community funds to enter a joint tenancy with a third party. It is submitted that the wife in *Thaxton* was entitled to a one-half interest in the bonds as her share of the property of the community.

It is clear that in *Thaxton* the bonds were acquired with funds belonging to the community.[13] The effect of the court's decision in granting the wife a one-fourth interest was to say that the husband could use community funds to enter a joint tenancy and retain as his separate property the interest acquired by the demise of his joint tenant. The result is a nothing-to-gain-all-to-lose proposition for the wife, and this result is contrary to the New Mexico theory that the husband acts as the agent of the community.

Based upon the civil law rule it was early held in New Mexico that the interest of the wife was a mere expectancy that could not vest in her, if at all, until the husband's death.[14] However, in *Beals v. Ares*,[15] decided in 1919, the supreme court said:

> Under the law in this jurisdiction, the wife's interest in the community property is equal with that of the husband; that while he is by statute made the agent of the community . . . during the continuance of the marriage relations, his interest in the property by reason of such fact is not superior to that of his wife.[16]

Beals has been cited many times for the proposition that the wife has a present vested interest in the property of the community.[17]

The nature of the wife's vested interest is apparently such that it extends to each asset of the community. In *In re Miller's Estate*,[18] the husband and wife died simultaneously in a common disaster. The action was brought by the wife's heirs who claimed an interest in the proceeds of the husband's insurance policy. The court found that the

13. 405 P.2d at 934.

14. Reade v. DeLea, 14 N.M. 442, 95 Pac. 131 (1908); Barnett v. Barnett, 9 N.M. 205, 50 Pac. 337 (1897).

15. 25 N.M. 459, 185 Pac. 780 (1919).

16. *Id.* at 499, 185 Pac. at 793.

17. *E.g.*, Dillard v. New Mexico State Tax Comm'n, 53 N.M. 12, 201 P.2d 345 (1949) (wife's vested interest is not affected by husband's agency for the community); Primus v. Clark, 48 N.M. 240, 149 P.2d 535 (1944) (wife's vested interest sufficient reason for voiding an unequal property settlement); *In re* Miller's Estate, 44 N.M. 214, 100 P.2d 908 (1940) (wife has vested interest in proceeds of insurance policy obtained by husband after marriage); *In re* Chavez' Estate, 34 N.M. 258, 280 Pac. 241 (1929) (wife's interest is equal to that of her husband regardless of fact that statute makes him manager of the community). See generally Clark, *op. cit. supra* note 5, at 22.

18. 44 N.M. 214, 100 P.2d 908 (1940).

proceeds constituted community property because the policy was acquired after marriage. The wife's heirs prevailed and the court said, "Her interest in the community property is an ever-present existing interest equal to that of the husband."[19]

Although the wife's vested interest extends to each asset of the community, she does not have the power to restrict her husband's disposition of personal property.[20] New Mexico adopted its community property statutes from California.[21] In California the husband is restricted by statute in making dispositions of community personal property—he may not make a gift of nor transfer personal property without a valuable consideration unless the wife consents in writing.[22] By omitting these restrictions from the New Mexico statute it may be assumed that it was the intent of the legislature to allow the husband to make any disposition of personal property, except fraudulent dispositions of the wife's interest.[23] There is apparently no prohibition in New Mexico to prevent a husband from using community funds to enter a joint tenancy with a third party.[24]

If the wife's interest does continue in the property contributed to the joint tenancy, then it follows that she should participate in any gain accruing to the property contributed. In New Mexico it is presumed that all property acquired after marriage by either spouse, or both, is community property.[25] To rebut this presumption, the spouse acquiring the property must show that acquisition was by lucrative title rather than acquisition by onerous title.[26] De Funiak distinguishes acquisition by onerous and lucrative title in his treatise on community property:[27]

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19. *Id.* at 218, 100 P.2d at 911.

20. N.M. Stat. Ann. § 57-4-3 (1953).

21. McDonald v. Lambert, 43 N.M. 27, 85 P.2d 78 (1938). In *McDonald* the court pointed out the fact that it had not always followed the construction given by the California courts, and that it was not bound to do so in the future. The independence expressed by the court in *McDonald* is not peculiar to New Mexico. In Horne, *Community Property—A Functional Approach,* 24 So. Cal. L. Rev. 42 (1950), the author notes that each of the community property states has, for the most part, remained independent of the decisions of its sister states.

22. Cal. Civ. Code § 172. Under this statute it has been held that a wife could recover her husband's gambling losses on the ground that he transferred personal property of the community without receiving a valuable consideration. Novo v. Hotel Del Rio, 141 Cal. App. 2d 304, 295 P.2d 576 (1956), 30 So. Cal. L. Rev. 95 (1956).

23. While there are no New Mexico cases in point, this conclusion is reached in Clark, *op. cit. supra* note 5, at 22-25.

24. *Id.* at 19.

25. See note 2 *supra* and accompanying text.

26. *E.g.,* Thaxton v. Thaxton, 405 P.2d 932 (N.M. 1965).

27. 1 de Funiak, Principles of Community Property (1943).

> That property acquired by husband and wife during the marriage through their labor or industry or other valuable consideration is said to be acquired by onerous title. . . . With the exception that property acquired through valuable consideration which is wholly the separate property of one spouse naturally retains the character of separate property, property acquired by onerous title is always community property. This is so because it is acquired by the labor and industry of members of a form of partnership . . . *or is acquired for valuable consideration which had previously been acquired by the industry and labor of the marital partnership.* . . .
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> [P]roperty acquired by lucrative title is that acquired through gift, succession, inheritance or the like. *It has its basis in pure donation on the part of the donor.*[28]

If the test supplied by de Funiak were applied to the facts in *Thaxton,* it appears that the husband, to overcome the presumption that all of the bonds became community property, would be required to prove that it was the intent of his joint tenant to make a gift to him, and that he thus acquired his joint tenant's interest by lucrative title. The court in *Thaxton* properly found that one-half of the bonds were acquired by onerous title, but the court did not discuss the husband's acquisition of the one-half interest by virtue of his right of survivorship in the joint tenancy.[29]

It is recognized that the facts in a given case might dictate the result that a gift to the surviving joint tenant was intended. It might be such a case, for example, when one party to the joint tenancy is aged and infirm and enters the agreement in contemplation of death. However, such a contention in a case like *Thaxton,* that the husband received his joint tenant's interest in the nature of a gift, would seem fruitless because such a finding would be contrary to the recognized nature and purpose of the joint tenancy estate. If the intent of the husband's joint tenant had been to confer a gift upon him it is apparent that other means were readily available. Especially is this true in *Thaxton* where the bonds were acquired over a period of twelve years.[30] These facts tend to refute any contention that the father entered the joint tenancy in contemplation of death.

It is questionable, however, whether the intent of the deceased joint tenant to make a gift would work to enable the husband to retain

28. *Id.* at § 62, p. 146. (Emphasis added.)
29. 405 P.2d at 934.
30. Record, p. 49.

the deceased tenant's interest as separate property in a case where the contribution of community funds was a necessary requirement for the creation of the joint tenancy. If, for example, the joint tenants had acquired a parcel of real estate with half the purchase price being paid with community funds, why should the parties be allowed to regard the wife's interest as a loan, thus depriving her of any claim to any appreciation in the investment? It will be recalled that this was the effect of *Thaxton*, where after the husband succeeded to the rights and interests of his joint tenant he was required to return only the amount of the wife's vested interest in the initial purchase.[31]

It is submitted that this result in *Thaxton* is contrary to the New Mexico position that the husband is the agent of the community.[32] It has been recognized by the New Mexico courts that while the community property statute designated the husband as manager of the community property,[33] the definition of his managerial authority was left to the courts.[34] Thus, the New Mexico courts have said that the husband acts in the interest of the community in the legal capacity of agent.[35] The only exception to this determination is found in cases involving property settlements between the husband and wife in conjunction with a divorce. In these cases the husband is usually regarded as a trustee because of the confidential relationship of the parties.[36] As the agent of the community, it seems that all dispositions of community personal property by the husband should be made in the interest of the community, and that all gains resulting from such dispositions should accrue to the community.[37]

It thus appears that grounds exist for a New Mexico wife to claim an interest in property acquired by a husband by virtue of his right of survivorship in a joint tenancy when the husband used community funds to enter the joint tenancy estate. However, one possibility remains for the husband to contend that property acquired by virtue of his right of survivorship does not become community property. In

31. See note 8 *supra* and accompanying text.

32. *E.g.*, Dillard v. New Mexico State Tax Comm'n, 53 N.M. 12, 201 P.2d 345 (1949); McDonald v. Senn, 53 N.M. 198, 204 P.2d 990 (1949).

33. N.M. Stat. Ann. § 57-4-3 (1953).

34. See note 33 *supra* and accompanying text.

35. Dillard v. New Mexico State Tax Comm'n, 53 N.M. 12, 201 P.2d 345 (1949), adopting the rule of Poe v. Seaborn, 282 U.S. 101 (1930).

36. *E.g.*, Primus v. Clark, 48 N.M. 240, 149 P.2d 535 (1944); Beals v. Ares, 25 N.M. 459, 185 Pac. 780 (1919).

37. 1 Mechem, Agency § 1191 (1914). The section provides that the agent's duty to the principal requires that he act in behalf of and for the benefit of his principal. "He cannot perform this duty if he is constantly attempting to use his agency for his own purposes." *Ibid.*

Yeoman v. Sawyer,[38] a California case, the court held that an attempt by a husband to enter a joint tenancy with a third party did not result in a joint tenancy but instead the estate created was a tenancy in common. The court's theory was that the requirements of unity of time, title, interest, and possession were necessary to create a joint tenancy; and because the wife had a vested interest in the community property contributed by the husband, the husband's interest was not equal to that of his intended joint tenant. Thus the husband and wife each held a one-fourth undivided interest and the third party held a one-half undivided interest.[39] If the New Mexico Supreme Court were to accept the holding of *Yeoman* in a case similar to *Thaxton,* it would be faced with two alternatives. The court could find that there was an implied gift to the husband of the deceased tenant's undivided one-half interest, but it would probably be more inclined to find that the property did not belong to the husband at all, but rather that it belonged to the heirs of his deceased co-tenant. If the court were to arrive at the result last mentioned, the decision would be contrary to the interests of both the husband and the wife.

Thaxton did not answer the question in New Mexico whether a husband, acting as the agent of the community, may use community funds to enter a joint tenancy with a third party. It is suggested that to allow the creation of such estates, with the exception of fraudulent attempts to deprive the wife of her interest in the property, serves two worthwhile purposes. The interests of the husband's joint tenant would be served because he would be able to rely upon his agreement, and the policy of the New Mexico courts would be recognized in that "third persons who deal with the husband . . . shall be assured that the wife shall not be permitted to nullify his transactions."[40] This pol-

38. 99 Cal. App. 2d 43, 221 P.2d 225 (1950), 25 So. Cal. L. Rev. 354 (1952). In *Yeoman*, the husband left his home and moved to California where he met the defendant. The husband and defendant lived together as man and wife and together acquired real property as joint tenants. Upon the husband's death his wife claimed an interest in the property on the ground that the husband had used community property to enter a joint tenancy with defendant.

39. *Ibid.* Compare N.M. Stat. Ann. § 70-1-14.1 (1955):

> An instrument conveying or transfering title to real or personal property to two [2] or more persons as joint tenants, to two [2] or more persons and to the survivors of them and the heirs and assigns of the survivors, or to two [2] or more persons with right of survivorship, shall be prima-facie evidence that such property is held in a joint tenancy and shall be conclusive as to purchasers or encumbrancers for value. In any litigation involving the issue of such tenancy a preponderance of the evidence shall be sufficient to establish the same.

40. Poe v. Seaborn, 282 U.S. 101, 112 (1930), quoted with approval in Dillard v. New Mexico State Tax Comm'n, 53 N.M. 12, 19, 201 P.2d 345, 350 (1949).

icy would be frustrated if the husband predeceased his joint tenant and the joint tenant's claim to the property was substantially reduced by the wife's claim of an undivided one-fourth interest and an undivided one-fourth interest for her husband's estate.[41]

Similarly, if a New Mexico husband may use community funds to enter a joint tenancy the interests of the wife are best served by allowing her to participate in any gain resulting from the agreement. In the absence of fraud, there is apparently no way in which the wife can prevent her husband from entering into a joint tenancy; he may even make a gift of personal property of the community or transfer it without receiving valuable consideration.[42] If by reason of the husband's agreement with a third party the wife stands to lose a portion of her interest in the property of the community, she should also be allowed to participate in the property acquired when her husband survives his joint tenant.

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41. See note 39 *supra* and accompanying text on the result in Yeoman v. Sawyer, 99 Cal. App. 2d 43, 221 P.2d 225 (1950).

42. See note 23 *supra* and accompanying text.