Property Character Does Not Change Without a Deed

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A recent Washington Supreme Court decision focuses on when separate property may become community property. It requires everyone in the real estate business to reconsider what they think they know about community property in Washington.

Some lawyers are reacting with comments that this decision makes it hard to rely upon prior deeds to determine who owns the property. I think this decision will help title companies have less trouble deciding when the parties intend to change the character of the property.

Lawyers have a saying that *hard facts make bad law.* Well, the facts of the case seem simple*, to a title geek.*

For those who want to read the Court's words, not rely on mine, it is named *In the Matter of the Estate of Borghi,* filed as docket no. 80925-9 on November 5, 2009. It is a split decision; the opinion is signed by 4 Justices, 1 Justice concurred in the decision but not the opinion, and 4 Justices signed a dissenting opinion that disagrees with the conclusion.

Just the facts:

In 1966, Jeanette Gilroy, an unmarried woman, entered into a real estate contract. She married Robert Borghi nine years later in 1975. Four months later in 1975, a fulfillment deed was signed from contract seller to "Robert and Jeanette Borghi, husband and wife." Jeanette and Robert did not join on that fulfillment deed to acknowledge intent to hold title as community property. They began to live on the property in 1975 and remained there together until 1990. In 1979 Jeanette and Robert both signed as grantors on a Deed of Trust to buy a mobile home that was located on the property. The mortgage was later paid and released. There never was a deed or any other document signed by Jeanette to add Robert to the title, or to state intent to establish community property. There was no Community Property Agreement. Jeanette died in 2005, still married to Robert, without a Will. She was survived by Robert Borghi, her spouse, and by Arthur Gilroy, her son from a prior marriage.

Before you read the decision or further below, based on your knowledge of WA title law, please answer these questions:

1. Presuming the property was Jeanette's separate property when it was acquired by her as an unmarried person, *did the fulfillment deed change the property to community property*?

2. When Jeanette and her new spouse signed a mortgage as husband and wife, *did that change the property to community property*?

3. Presuming a married couple borrows money secured by a mortgage on the separate property of one spouse, then uses the funds to build a house on the land, then live in it for 15 years while paying all the mortgage payments from the community assets, *do those facts clearly and convincingly show they intended to change the property to community property?*

Are your answers correct? **Here is how the Washington courts answered those questions:**

The King County trial court concluded it was community property, so it was inherited by the husband. Then the first level Court of Appeals (Division I) reversed, "reluctantly" concluding the property remained Jeanette's separate property, so it was inherited by her son. In the recent decision, the Supreme Court agreed the property remained separate property.

The Supreme Court opinion starts by recital of the *apparently* most important presumption: "*the character of property as separate or community property is determined at the date of acquisition."* ... "Once the separate character of property is established, a presumption arises that it remained separate property in the absence of sufficient evidence to show an intent to transmute the property from separate to community property."

This decision quotes from a 1911 case, *Guye v Guye*, 63 Wash. 340:

Moreover, the right of the spouses in their separate property is as sacred as is the right in their community property, and when it is once made to appear that property was once of a separate character, it will be presumed that it maintains that character until some direct and positive evidence to the contrary is made to appear.

The holding of this decision is, **"Today we make clear that, once a presumption in favor of either community or separate property is established, the burden to overcome the presumption is by clear and convincing evidence."**

This decision appears to overrule prior cases that discuss a "*joint title gift presumption*" arising from a change in title to include both spouses' names. One may argue those cases were not expressly overruled, but after reading the opinion, I conclude that **the presumption that property does not change character wins over any change in the names on the title unless there is also "clear and convincing evidence" the parties intend to change the character.**

How strong is that presumption? **How much evidence of intent is required to be "clear and convincing?**

Let's go back to the facts of this case: Evidence that Jeanette and Robert accepted a fulfillment deed vesting in them as a married couple, accepted without a challenge for 30 years, followed by jointly signing a mortgage where the borrowed funds were used to acquire a house they lived in for 15 years, where joint funds were used to pay the mortgage over many years, **was *not* clear and convincing**.

This opinion is authority that clear and convincing evidence the party holding as separate property intends to change the property to community property occurs by a signed and acknowledged deed or community property agreement.

But, what about their joint signature on the mortgage?

This Court opinion did not state how Jeanette and Robert's names appeared on their grant of a Deed of Trust. However, that certainly is a conveyance, is acknowledged and recorded. The opinion discusses the effect of that document as follows in a footnote:

"To the extent the Estate relies on Robert and Jeanette Borghi's subsequent use of the property to secure a mortgage under which they were jointly obligated, this fact is immaterial to the determination of the character of the property. Under the date of acquisition rule noted above, the separate property character of the property was established at the time Jeanette Borghi contracted to purchase the property. Later community property contributions to the payment of obligations, improvements upon the property, or any subsequent mortgage of

the property may in some instances give rise to a community right of reimbursement protected by an equitable lien, but such later actions do not result in a transmutation of the property from separate to community property." [citations omitted.]

The decision repeats that the names on the deeds do not establish community or separate property. That depends on the source of funds and the intent of the parties. Absent clear and convincing evidence that the parties specifically intend to change the character of the property, "**no presumption arises from the names on a deed or title.**"

Rules for Title Examiners:

The lesson of this decision is clear, and simple: Title examiners should not change vesting just because a fulfillment deed, deed of trust or other conveyance from both may show both their names. We should show vesting as the title was acquired, then show a Schedule B exception for "possible right, title or interest of [spouse] disclosed by the joint signature on the prior deed of trust." We should not change vesting unless the originally vested owner signs an acknowledged deed, or community property agreement, that changes the vesting.

See, this Supreme Court decision actually makes the decision of the title company easier than it was before.

Now, it's your turn: **Do you think the Court got the answers right?**

Feel free to comment, respectfully, on the decision of four out of the nine Justices.

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