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Tax Court & Board of Tax Appeals Reported Decisions

ARMOREL KAMINS, 54 TC 977

Armorel Kamins, Petitioner v. Commissioner of Internal Revenue, Respondent

Case Information:

[pg. 977]

Code Sec(s):	
Docket:	Docket No. 5981-68.
Date Issued:	05/14/1970
Judge:	Opinion by DAWSON, *J.*
Tax Year(s):	Year 1965.
Disposition:	Decision for Commissioner.

HEADNOTE

1. LOSSES—Casualty and disaster—how much is deductible—personal use property. Casualty loss deduction denied taxpayer for amount exceeding½ amount of earthquake damage to residence. Residence was owned jointly by taxpayer and her former husband as community property at time of loss. Although it was subsequently set over to her as her separate property under stipulated property settlement in tax year, she didn't prove it became her separate property and that such transformation occurred on or before day prior to loss.

Reference(s): 1970 P-H Fed. ¶ 14,377(55).

Syllabus

Official Tax Court Syllabus

Held, that the petitioner is entitled to deduct as a casualty loss under sec. 165, I.R.C. 1954, only one-half of the loss to a residence which, at the time of loss, was owned jointly by petitioner and her former husband as community property under the law of the State of Washington, notwithstanding the fact that, subsequent to the loss but within the same taxable year, the residence was set over to petitioner as her separate property pursuant to a stipulated property settlement incorporated in the decree granting petitioner a divorce from her former husband.

Counsel

Ralph B. Potts, for the petitioner.

Stephen E. Silver, for the respondent.

Dawson, *Judge:*

Respondent determined a deficiency of $1,943.86 in petitioner's income tax for the year 1965.

On January 11, 1965, petitioner instituted an action for divorce from her late former husband, Selwin Kamins, in the Superior Court of King County, Washington, a community property State. On April 29, 1965, an earthquake damaged their family community-property residence, causing a loss of $16,853.48. On July 21, 1965, petitioner and Selwin agreed that the residence "be set over to [petitioner] as her sole and separate property." This agreement was approved in the divorce decree entered July 27, 1965. On her Federal individual income tax return for 1965 the petitioner claimed a deduction of $16,853.48 with respect to the casualty loss to the residence. Respondent disallowed one-half of the claimed casualty loss deduction on the ground that petitioner, at the time of the loss, owned only an undivided one-half interest in the residence because it was then community property. Thus, the only issue presented is whether petitioner is entitled to a deduction with respect to the casualty loss to the residence under section 165, Internal Revenue Code of 1954,[1] in excess of the amount ($8,326.74) allowed by respondent.

FINDINGS OF FACT

Some of the facts have been stipulated. The stipulation of facts and exhibits attached thereto are incorporated herein by this reference.

Armorel Kamins (herein called Armorel) was a legal resident of Seattle, Wash., at the time she filed her petition in this proceeding. She filed her individual Federal income tax return for the year 1965 with the district director of internal revenue at Seattle, Wash.[pg. 978]

Armorel and her late, former husband Selwin (herein called Selwin) were married on February 7, 1948, in Washington, a community property State. They had two boys, Kirt and Charles, who were 16 and 14 years of age, respectively, during 1965.

Prior to January 15, 1965, Armorel, Selwin, and the two boys lived in the family home located at 1249 Northwest Elford Drive, Seattle (herein referred to as the residence). This is known as tract 10, Elford Park Addition to King County.

The residence consists of a large house, a smaller totally self-contained bungalow-type dwelling or cabana (located about 500 feet from the large house), and a swimming pool. The residence was acquired by Armorel and Selwin as community property.

Long-standing marital difficulties prompted Armorel, with her attorney Ralph B. Potts, and Selwin, with his attorney George Guttormsen, to meet on October 26, 1964, to discuss a possible property settlement for the division of their community property. Divorce was imminent. "The principal matter [at this meeting] was the listing of the assets of the community to determine whether or not there could be any formula reached with respect to a property settlement agreement." At this meeting Armorel and Selwin acknowledged having the following community assets in their respective possession:

Community assets in Armorel's possession	
Armorel Kamins Interiors checking account.....	$10,000.00
Washington Mutual Savings Bank.....	2,000.00
Cadillac convertible	3,300.00
Alpha Phi bonds	500.00
Total	$15,800.00
Community assets in Selwin's possession	
K & M Farm Machinery Co. checking account	$1,000.00
K & M Farm Machinery Co. accts. receivable ...	300.00

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Viking Laboratories, checking account ........    1,600.00
Truck and camper .............................    3,295.00
Stationwagon (Pontiac) .......................    2,060.00
Misc. stocks at cost<1> ......................   53,044.60
       Total ..............................................
$61,299.60
                    Community assets held jointly
Residence ....................................  $80,000.00
Furniture, fixtures, and equipment ...........    3,000.00

$83,000.00
       Total ..............................................
160,099.60
-------------------------------------------------------------------
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<1>FMV as of 1/12/65 $57,497.60.
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"[T]here was no agreement of any kind reached" at this first meeting.

On November 16, 1964, the parties again met with their attorneys in another effort to reach a property settlement. At this second meeting the parties considered a proposal under which Armorel would have received assets, including the residence, with an approximate value [pg. 979]of $37,000 in excess of the value of the community assets Selwin would have received. Selwin offered to agree to this proposal if Armorel would give him a note in the amount of $18,000 which would not bear any interest until January 1968, after which time it would bear 6-percent interest and be payable on the basis of $150 a month. Armorel "promptly turned down" this offer. No property settlement was reached at the November meeting.

On January 11, 1965, Armorel filed an action for divorce. In the complaint she asked the Superior Court of King County, *inter alia*, to make "a reasonable disposition and division of the community property," including the residence. In listing the property which the parties owned, Armorel made the following allegation in the complaint:

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Property owned in the name of both above names [sic] parties:
Tract of land and home located thereon legally described as: Tract
10,
Elford Park Addition to King County, State of Washington.
of the value of approximately $80,000.
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In response to a show cause order obtained by Armorel, the Superior Court ordered Selwin to "remove himself, by 6 P.M., Friday, January 15, 1965, from the entire premises located at 1249 N. W. Elford Drive, Seattle, Washington." Selwin vacated the premises pursuant to such order.

On February 25, 1965, Selwin filed a cross-complaint for divorce against Armorel. In the cross-complaint, Selwin admitted that the community property as set out above (this same listing was also contained in Armorel's complaint) was substantially correct.

In February 1965, Armorel expended $1,099.50 to shore up the foundation of the house so that it would not slide down the hill on which it was situated. She asked Selwin to share such expenses, but he refused.

In early 1965, subsequent to his leaving the residence under court order, Selwin received the 1965 Real Estate Tax Statement which disclosed a liability of $751.90 for real estate taxes on the residence. Selwin directed his attorney, George Guttormsen, to send the statement to Potts. In his letter of April 23, 1965, Guttormsen advised Potts:

At the direction of Mr. Kamins, I enclose herewith the real estate tax statement for Lot 10 Elford Park.

Mr. Kamins feels that as long as Mrs. Kamins occupies the property and he is restrained from entering upon it, she should pay the taxes.

In a reply letter dated April 27, 1965, Potts informed Guttormsen:

I am in receipt of your letter of April 23rd, 1965 enclosing real estate tax statement covering Lot 10 Elford Park, King County, Washington.[pg. 980]

I am sure that your client Mr. Kamins does not mean, by sending me the tax statement for this property, that he is relinquishing his interest in the same to Mrs. Kamins. He certainly is obligated to take care of his two sons and to provide a roof over their heads. The cheapest and easiest way for him to do it is to let them stay in the *family residence* and the court, of course, ordered him out.

I assume from your talks with me that Mr. Kamins considers this community property and so do I.

[Emphasis added.]

The parties each ultimately agreed to pay one-half ($187.98) of the first installment (one-half of the total or $375.95) of the real estate taxes due by April 30, 1965.

On April 29, 1965, the residence was damaged by an earthquake which struck Seattle and the surrounding area. The amount of the loss to the residence, as determined by the estimated cost of repairs thereto, was $16,853.48.

The damage to the property caused by the earthquake was so severe and was of such a nature as to require certain immediate repairs to prevent the structures thereon (the house, cabana, and pool) from sliding and causing further damage. Selwin refused to defray any of the cost for these repairs. Armorel spent $2,439 for repairs to protect against further damage resulting from the earthquake.

Shortly after the earthquake, Potts in a letter dated May 7, 1965, to Guttormsen, wrote:

Mrs. Kamins believes that the damage to this property is so considerable that it should be re-appraised. Certainly before trial, and if there is any talk of settlement, that it should be re-appraised before such talks are commenced. You, of course, are invited, on behalf of your client, to send whatever appraisers you wish to re-survey and appraise the property. Perhaps we should do the same.

From the time Armorel filed the complaint in the divorce proceeding until the time set for trial thereof on July 21, 1965, the parties made no further attempt to make a division of their community property. Nor was any agreement for the division of their community property reached during this period.

Then, on July 21, 1965, the date for trial, Armorel and Selwin reached a mutually agreeable basis for the property settlement. They stipulated to the agreed settlement in open court. The stipulation provided, *inter alia*, that "the family home described as Tract 10, Elford Park Addition to King County, State of Washington *** be set over to *** [Armorel] as her sole and separate property."

The Superior Court approved the property settlement agreement entered into in open court by the parties in the decree of divorce dated July 27, 1965.

Armorel claimed a casualty loss deduction of $16,853.48 with respect to the earthquake damage to the residence on her 1965 Federal individual[pg. 981] income tax return. Respondent disallowed one-half of the claimed casualty loss deduction with the explanation that Armorel, at the time of the loss, had only a one-half interest in the residence because it was community property.

OPINION

Respondent does not dispute that the damage to the residence caused by the earthquake in 1965 constitutes a deductible casualty loss under section 165,[2] that the total amount of such loss was $16,853.48, or that Armorel subsequently received the residence as her separate property under the stipulated property settlement on July 21, 1965. The controversy herein is whether or not Armorel is entitled to deduct more than one-half of the casualty loss on her Federal individual income tax return for the year 1965.

Section 165(c)(3) provides that "a [casualty] loss *** shall be allowed only to the extent that the amount of loss to [the] individual exceeds $100." It is clear that the extent of a casualty loss to an individual is determined by the extent of his interest in the property at the time the loss occurs. It is likewise clear that the amount of a casualty loss allowable to the owner of a joint undivided interest in jointly owned property is proportionate to his interest in such property. Accordingly, to allow Armorel to deduct more than one-half of the casualty loss, it must be shown that, at the time of the loss, she had more than a one-half interest in the residence. The determination of her interest in the residence must be made under the community property law of the State of Washington. *Lang* v. *Commissioner,* 304 U.S. 264 (1938); *S. E. Brown,* 52 T. C. 50 (1969).

The law of Washington is well settled that a husband and wife have vested, equal, and undivided interests in community property. *Poe* v.*Seaborn,* 282 U.S. 101, 111 (1930); *In re Wegley's Estate,* 65 Wash.2d 689, 399 P.2d 326 (1965); *In re Towley's Estate*, 22 Wash.2d 212, 155 P.2d 273 (1945); *In re Coffey's Estate*, 195 Wash. 379, 81 P.2d 283 (1938); *Bortle* v.*Osborne* , 155 Wash. 585, 285 Pac. 425 (1930);*Schramm* v. *Steele*, 97 Wash. 309, 166 Pac. 634(1917); *United States* v. *Merrill*, 211 F.2d 397 (C.A. 9, 1954); and *Commissioner* v.*Larson* , 131 F.2d 85, 87 (C.A. 9, 1942).[pg. 982]

Respondent takes the position that, at the time of the loss, the residence was community property and that, since Armorel owned only a one-half undivided interest therein at such time, she is entitled to deduct only one-half of the casualty loss. Although Armorel admits that the residence was community property when acquired, she contends that she is entitled to deduct the entire loss because the status of the residence was changed from community property to her separate property in one of three ways: (1) By a definite oral understanding between herself and Selwin; (2) by operation of Washington law, or (3) by equitable estoppel. We agree with respondent.

The burden of proof rests squarely on Armorel to show that the residence became her separate property and that such transformation occurred on or before April 28, 1965. *Welch* v. *Helvering*, 290 U.S. 111 (1933); Rule 32, Tax Court Rules of Practice. Indeed, under Washington law, "property acquired by purchase during marriage is presumed to be community property, and the burden rests on the spouse asserting its separate character to establish his or her claim by clear and satisfactory evidence."*Denny* v. *Schwabacher*, 54 Wash. 689, 104 Pac. 137, 138 (1909). See also *In re Slocum's Estate*, 83 Wash. 158, 145 Pac. 204, 205 (1915), where the Supreme Court of Washington stated: "The presumption as to the community character of the property may be overthrown only by evidence of a *clear, certain,* and*convincing* character." (Emphasis added.)

After a careful examination of the entire record, we conclude that Armorel has not sustained her burden of proving that the residence was converted from community property to her separate property on or before April 28, 1965.

1. *The Alleged Oral Agreement*.—Armorel's contention that the residence was transformed, prior to April 29, 1965, into her separate property by oral agreement between herself and Selwin is without any support in this record. Her attorney points out on brief that "nowhere in the record is there any statement oral or in writing by Selwin Kamins to the effect that he wanted the [residence]." But the absence of such evidence on this point, particularly where, as here, the burden of proof is on Armorel, does not constitute the "clear, certain, and convincing" proof necessary to show a transformation of the status of the residence from community property to Armorel's separate property.

There is no evidence of any agreement, oral or otherwise, that the residence, prior to April 29, 1965, would belong to Armorel as her separate property. To the contrary, the evidence shows that, prior to July 21, 1965, the parties were unable to reach any agreement with respect to the division of their community property. Several factors support our conclusion.[pg. 983]

First, in his letter of April 27, 1965, just 2 days before the loss occurred, Potts wrote Guttormsen: "I assume from your talks with me that Mr. Kamins considers [the residence] community property *and so do I*." (Emphasis added.) It is significant, we think, that Armorel's own attorney, who must be presumed to know Washington community property laws, was of the opinion that the residence was community property. To be sure, the position Potts took in the letter is inconsistent with, and therefore detracts from, that which he is urging on us in this proceeding.

Second, Pott's letter of May 7, 1965, to Guttormsen suggests that no agreement was concluded between the parties with respect to the residence until sometime after the earthquake. In that letter, Potts, in reference to the earthquake damage to the residence, stated: "Certainly, before trial, and if there is any talk of a settlement, [the residence] should be re-appraised before such talks are commenced." If the parties had reached the "definite oral understanding beginning *** back in October and certainly in November (1964)" setting the residence over to Armorel as her separate property, there would not have been any need for Potts to be making the statement concerning "talk of a settlement" in May 1965, after the time of the loss.

Third, Armorel's testimony shows that the parties failed to reach a property settlement agreement prior to July 1965. She testified as follows:

Q. [Potts] Yes, now was there any agreement reached [at the November 1964 meeting]?

A. [Armorel] As to the exact settlement of the figure, no. ***

Q. But just before trial [of the divorce action], I believe, an agreement was reached in which [Selwin] dropped the eighteen, demand for an eighteen thousand dollar judgment [sic], is that correct?

A. Yes.

Q. Otherwise the settlement proposed back in November of 1964 was substantially the same as that agreed upon?

A. All figures were based on December 31, 1964, all pretrial affidavits, all, everything.

Although the agreement reached in July 1965 was substantially the same as the one *proposed* in November 1964, this testimony makes it clear that no agreement was reached until July 1965.

Fourth, Guttormsen, Selwin's attorney in the divorce proceeding, testified "that there was no agreement reached with respect to the division of the property and that includes up to the date of the trial [in the divorce proceeding] itself." He further testified: "Both parties were ready to go to trial *when at that time* a property settlement agreement was reached between the counsel." The uncontroverted testimony of this witness, considered in conjunction with the other circumstances[pg. 984] of this case, convinces us that the parties were unable to enter into any property settlement agreement prior to July 1965.

Having concluded that no agreement was reached before the crucial date of the loss, we do not have to consider the following questions: (1) Whether, under Washington law, the status of community real property can be changed to separate property by oral agreement between the spouses, or (2) whether the "oral agreement" was partially performed by Armorel's unilateral action in making certain repairs.

We note, in passing, that it is an apparently well-established principle of Washington law that the character of property cannot be changed from that of separate property to community property, or community to separate, by the oral agreement of the spouses alone. *In re Janssen's Estate*, 56 Wash.2d 150, 351 P.2d 510 (1960); *Leroux* v.*Knoll* , 28 Wash.2d 964, 184 P.2d 564, 566 (1967); *Rogers* v.*Joughin* , 152 Wash. 448, 277 Pac. 988, 991 (1929); *In re Parker's Estate*, 115 Wash. 57, 196 Pac. 632, 633 (1921);*Dobbins* v. *Dexter Horton & Co.*, 62 Wash. 423, 113 Pac. 1088, 1089 (1911); and *Churchill* v.*Stephenson* , 14 Wash. 620, 45 Pac. 28, 29 (1896).

We consider as irrelevant Armorel's argument that the statute of frauds does not apply to a stipulated property settlement made in open court between parties in a divorce action. No issue is raised herein with respect to the efficacy of the stipulated property settlement to divide the community property. It is essential to Armorel's argument that she prove she was the sole owner of the residence *at the time of the loss*. It avails her nothing to show that, subsequent to the loss, she succeeded to complete ownership thereof. Respondent readily concedes that the residence was converted to Armorel's separate property by operation of the stipulated property settlement, but not until July 21, 1965, which was after the date of the loss. The evidence clearly establishes that the status of the residence was not changed from community property to Armorel's separate property by oral agreement prior to July 21, 1965.

2. *Applicability of Community Property Laws*.—Next the petitioner argues that the community property law of Washington has no application to the circumstances of this case, but "that all we have *** is whether or not petitioner should have the advantage of the depreciation [sic] in the value of the property by reason of the earthquake which [sic] she had set over to her by court order." To support this argument, petitioner relies on those cases which hold that when for all intents and purposes a marriage has been terminated and the spouses show by affirmative action their intent not to maintain the community status, then the community property laws will not be applied to the spouses*with respect to their future earnings* . See*Rustad* [pg. 985]v. *Rustad*, 61 Wash.2d 176,377 P.2d 414 (1963); *MacKenzie* v. *Sellner*, 58 Wash.2d 101, 361 P.2d 165 (1961); *In re Janssen's Estate, supra; In re Armstrong's Estate*, 33 Wash.2d 118,

204 P.2d 500 (1949);*Togliatti* v. *Robertson*, 29 Wash.2d 844, 190 P.2d 575 (1948); *Yates* v. *Dohring*, 24 Wash.2d 877, 168 P.2d 404 (1946).[3] Petitioner's reliance on these cases is misplaced. They are clearly distinguishable. In each of them the court was confronted with the problem of determining whether, in the first instance, the earnings of a spouse were community or separate property where the marriage had been terminated in fact, but not legally dissolved. Contrary to petitioner's contention, these cases do not support the proposition that a de facto termination of a marriage in Washington automatically operates to divest a spouse of his or her present, equal, and undivided interest in the community property.

3. *Equitable Estoppel*.—Finally, the petitioner argues that the residence became her separate property by operation of equitable estoppel. This argument is based solely on the facts that Armorel spent $1,099.50 in February 1965 to shore up the foundation of the house and $2,439 shortly after the earthquake to make the needed repairs necessitated thereby, and that Selwin refused to defray any part of the expenses. We are not satisfied that, on the basis of these meager facts, the doctrine of equitable estoppel has any application in this case.

The Supreme Court of Washington in *Huff* v.*Northern Pacific Ry. Co.,* 38 Wash.2d 103, 114, 228 P.2d 121, 128 (1951), succinctly stated the doctrine of equitable estoppel as follows:

Where a person with actual or constructive knowledge of facts induces another, by his words or conduct, to believe that he acquiesces in or ratifies a transaction, or that he will offer no opposition thereto, and that other, in reliance on such belief, alters his position, such person is estopped from repudiating the transaction to the other's prejudice. *** [Citing authorities.]

See also *Kessinger* v. *Anderson*, 31 Wash.2d 157, 196 P.2d 289 (1948); and *Thomas* v. *Harlan*, 27 Wash.2d 513, 178 P.2d 965 (1947). Courts in Washington, reluctant to apply estoppel where its effect would be to divest a person of an estate in land, require "very clear and cogent evidence to estop an owner out of a legal title to real property." *Finley* v. *Finley*, 43 Wash.2d 755, 264 P.2d 246, 252 (1954); *Mugaas* v.*Smith* , 33 Wash.2d 429, 206 P.2d 332 (1949);*Tyree* v.*Gosa* , 11 Wash.2d 572, 119 P.2d 926 (1941); *Briggs* v. *Murray*, 29 Wash. 245, 69 Pac. 765 (1902). But here there is no competent evidence to estop Selwin out of [pg. 986]his legal title to, or community property interest in, the residence. Certainly his refusal to share the cost of the repairs in no way operated to divest him of his interest in the residence. Nor has Armorel shown any detrimental reliance on her part. It should be noted that the $2,439 expended by Armorel to repair the earthquake damage is considerably less than the amount equal to one-half of the loss which respondent allowed her with respect to the earthquake damage. Moreover, since the property settlement was reached after the

earthquake, it is reasonable to assume that the diminution in the value of the residence caused by the earthquake was taken into account by both parties in arriving at an equitable division of their community property. Under these circumstances we think the petitioner has failed to establish that the residence became her separate property by operation of equitable estoppel.

Accordingly, we hold that Armorel is not entitled to deduct more than one-half of the casualty loss.

Decision will be entered for the respondent.

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[1] All statutory references are to the Internal Revenue Code of 1954, as amended, unless otherwise indicated.

[2] SEC. 165. LOSSES.

(a) General Rule.—There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise. ***

(c) Limitation on Losses of Individuals.—In the case of an individual, the deduction under subsection (a) shall be limited to— ***

> (3) losses of property not connected with a trade or business, if such losses arise from fire, storm, shipwreck, or other casualty, or from theft. A loss described in this paragraph shall be allowed only to the extent that the amount of loss to such individual arising from each casualty, or from each theft, exceeds $100.

[3] The Internal Revenue Service has adopted the principle of these decisions in Rev. Rul. 68-66, 1968-1 C.B. 33, which provides in pertinent part:

"When for all intents and purposes a marriage has been terminated in the State of Washington, but not legally dissolved, and the spouses show by affirmative action their intent not to maintain the community status, no portion of the earnings of the husband is includible in the gross income of the wife where she has not received any of such earnings."

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