

Opinion No. 44-4478

March 10, 1944

BY: EDWARD P. CHASE, Attorney General

TO: Mr. Earle Kerr, Director, Succession Tax Division, Bureau of Revenue, Santa Fe, New Mexico. Attention: J. Leon Miller

In your letter dated March 9, 1944, you request an opinion relative to property accumulated during marriage, and particularly wish to know whether the same should be inventoried upon the death of the husband.

From correspondence attached to your letter. and from conversation with you, apparently two questions are involved. First, whether the earnings of the wife, outside of New Mexico, become community property when the marital domicile remains in New Mexico; and second, whether shares of stock purchased with community funds and issued in the wife's name become community property.

Section 65-401 of the 1941 Compilation, after referring to separate property of the husband and wife, provides that all other property acquired after marriage by either husband or wife, or both, is community property. This section is broad enough to cover the earnings of the wife from services rendered outside the state, so long as the marital domicile remains in New Mexico. 31 C. J., Section 1078, Page 14.

Section 65-304 of the 1941 Compilation provides:

"All property of the wife owned by her before marriage, and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof is her separate property."

Section 65-307 of the 1941 Compilation provides:

"The earnings and accumulations of the wife and of her minor children living with her, or in her custody, while she is living separate from her husband are the separate property of the wife."

The last mentioned section apparently only applies when there is a legal separation, and would not apply merely in the case where the husband and wife are temporarily absent while the wife is working. See *Michael v. Robe*, 109 S. W. 939, a Texas case decided in 1908.

Under Section 65-401 of the 1941 Compilation it is provided that whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that title is thereby vested in her as her separate property. However, this language has been

construed to refer only to realty, and not to personalty See McClendon v. Dean, 45 N.M. 496, 117 P. 2d 250.

In view of the fact that the earnings of the wife in another state, while the marital domicile remains in New Mexico, are personalty, the presumption is that the same would be community property. Carron v. Abounador, 28 N.M. 491, 214 P. 772; Roberts v. Roberts, 35 N.M. 593, 4 P. 2d 920. See also Albright v. Albright, 21 N.M. 606; Brown v. Lockhart, 12 N.M. 10; Nehr v. Armijo, 9 N.M. 325.

If community property is used to purchase real estate, and the title is taken in the name of the wife, although the presumption is that the real estate is the separate property of the wife, such presumption is rebuttable except in case of a purchaser or encumbrancer in good faith and for valuable consideration. See Section 65-401 of the 1941 Compilation.

As to shares of stock purchased with community funds and issued in the wife's name, the presumption is that the same are community property.

In view of these conclusions, the types of property above mentioned should be inventoried and appraised as part of the community property, upon the death of the husband.

By C. C. McCULLOH,

First Asst. Atty. General